

~~11/17/99~~ 11/29/99

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

## Defendants.

~~CIVIL ACTION~~ CASE NO.

## Defendants.

~~CIVIL ACTION NO.~~  
CASE NO.  
CV 91-0342-N-EJL

## CONSENT DECREE

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## I. BACKGROUND

1. The United States of America (“United States”), State of Idaho (“State”), Coeur d’Alene Tribe (“Tribe”) (collectively “Plaintiffs”) and the Union Pacific Railroad Company (“Union Pacific” or “Settling Defendant”) are the parties to this Consent Decree settling claims relating to the Union Pacific Wallace-Mullan Branch in northern Idaho.

2. The Project Area, as more specifically defined in Section IV (Definitions) herein, generally includes the approximately 71.5-mile long right-of-way for the main line and related sidings of Union Pacific’s Wallace ~~-Branch and~~ Mullan Branch between Mullan and Plummer, Idaho. In general, the Project Area does not include: the active rail line within certain areas of Plummer Junction and between Plummer Junction and Spokane, Washington and the abandoned line within certain areas of Plummer Junction and between Plummer Junction and Tekoa, Washington, both of which are located in the Coeur d’Alene Indian Reservation; any spurs or connecting branch lines outside of the Wallace ~~-and~~ Mullan ~~Branch~~ Branches right-of-way; the Wallace yard; and areas of the Hecla Mine possible encroachments on the right-of-way from the Lucky Friday Mine haul road, the Hecla tailings impoundment, the Morning Mine Rock Dump rock dump, the Lucky Friday Mine waste impoundment and the Burns Yaak Mine Dump that may encroach upon the right-of-way dump. The United States and the State have previously settled claims for response actions by Union Pacific within the 7.9 mile section of the right-of-way within the Bunker Hill Superfund Site, and Union Pacific has been implementing remedial actions in that area pursuant to a prior consent decree in United States v. Union Pacific, (D. Idaho), Case No. 95-0152-~~E~~ N-HLR.

3. The United States, on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”) and the Secretaries of the Departments of the Interior and Agriculture, filed a complaint in this matter against Union Pacific pursuant to Sections 106

and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9606, 9607, and Sections 301 et seq. of the Clean Water Act, 33 U.S.C. § 1251 et seq. **[Need to conform with Complaint when filed]**

4. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred and to be incurred by EPA, the Department of Justice, and other federal agencies and departments for response actions in connection with the Project Area in the Coeur d’Alene Basin in northern Idaho, together with accrued interest; (2) performance of studies and response work by Settling Defendant in the Project Area consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended); and (3) damages, including assessment costs, for injury to natural resources under the trusteeship of the United States in the Coeur d’Alene Basin Environment. **[Need to conform with Complaint when filed]**

5. On September 29, 1995, the United States, the State and the Tribe proposed that Settling Defendant and other defendants submit a good faith offer to settle the Trustees’ claims for Natural Resource Damages.

6. The State has joined in the complaint filed by the United States against Union Pacific in this Court alleging that Union Pacific is liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, Idaho Code Sections 39108, 4413, 4414, and relevant state law. **[Need to conform with Complaint when filed]**

7. On July 31, 1991 and October 22, 1996, the Tribe filed its Complaint and First Amended Complaint, respectively, against Union Pacific pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, to recover damages, including assessment costs, for injuries to natural resources under the trusteeship of the Coeur d’Alene Tribe in the Coeur d’Alene Basin Environment.

8. Except as otherwise provided in this Consent Decree, in signing this Decree the Settling Defendant denies any and all legal and equitable liability and reserves all defenses under any federal, state, local or tribal statute, regulation, or common law for any claim, endangerment, nuisance, response, removal, remedial or other costs or damages incurred or to be incurred by the United States, the State, the Tribe or other entities or persons as a result of the release or threatened release of hazardous substances at, in, from, on, or under the Project Area or any Natural Resource Damages in the Coeur d'Alene Basin Environment. Pursuant to 42 U.S.C. § 9622(d)(1)(B), entry of this Consent Decree is not an acknowledgment by Settling Defendant that any release or threatened release of a hazardous substance constituting an imminent and substantial endangerment to human health or the environment has occurred or exists in the Coeur d'Alene Basin Environment. Settling Defendant does not admit and retains the right to controvert any of the factual or legal statements or determinations made herein in any judicial or administrative proceeding except in an action to enforce this Consent Decree or as provided in Paragraph ~~426~~ 134. Settling Defendant does agree, however, to the Court's jurisdiction to enter and enforce this Consent Decree. In any such proceedings to enter or enforce this Consent Decree, the Settling Defendant shall not challenge the terms of this Consent Decree. This Consent Decree shall not be admissible in any judicial or administrative proceeding against the Settling Defendant, over its objection, as proof of liability or as an admission of any fact dealt with herein, but it shall be admissible in an action to enforce this Consent Decree. This Consent Decree shall not be admissible in any judicial or administrative proceeding brought by or on behalf of any Natural Resource Trustee for Natural Resource Damages, or in any judicial or administrative proceeding brought against any Natural Resource Trustee, over the objection of any Natural Resource Trustee, as proof of or a defense to liability or as an admission of any fact dealt with herein.

9. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Bunker Hill Facility on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658.

10. In response to a release or a threat of a release of hazardous substances at or from areas of the Project Area currently or formerly owned or operated by Union Pacific, EPA, the Departments of the Interior and Agriculture, the Tribe and the State, with the assistance of Union Pacific, prepared an Engineering Evaluation/Cost Analysis (“EE/CA”) proposing response actions to be implemented at the Project Area to address those releases or threats of release. On January 22, 1999, the EE/CA was made available for public review and comment for a forty-five (45) day period. EPA, with the participation of the Federal Trustees, the Tribe and the State, considered and responded to those public comments. On October 13, 1999, EPA, the State, and the Tribe signed an Action Memorandum approving the response actions identified in the EE/CA for the Project Area.

11. Concurrently with the negotiation of this Consent Decree, Union Pacific and the Plaintiffs have negotiated a Statement of Work (“SOW”) to implement the response actions identified by the EE/CA for the Project Area. The SOW is attached to and incorporated into this Consent Decree.

12. Since 1992, the Departments of the Interior and Agriculture and the Coeur d’Alene Tribe, as federal and tribal trustees for Natural Resources in the Coeur d’Alene Basin have been conducting a Natural Resource Damages Assessment. The area covered by the Natural Resource Damages Assessment begins at the uppermost reaches of the creeks and streams that serve as tributaries to the South Fork of the Coeur d’Alene River near the Idaho/Montana border, and extends through Lake Coeur d’Alene. The area includes a vast wetlands complex adjacent to more than 12 lateral lakes near the mouth of the Coeur d’Alene

River, extensive habitat for wildlife and aquatic resources, and an extensive variety of water, geological, and cultural resources.

13. Union Pacific commenced proceedings to abandon the Wallace ~~-and~~ Mullan Branch Branches in 1991. The Interstate Commerce Commission, by its initial decision, 9 I.C.C. 2d 325 (Oct. 15, 1992), as clarified in State of Idaho et al. v. ICC, 35 F.3d 585 (D.C. Cir. 1994), and its subsequent decision of November 28, 1994, 1994 WL 670117 (I.C.C.), authorizing abandonment, imposed six environmental conditions which must be met before Union Pacific may begin salvage of the Wallace ~~-and~~ Mullan Branch rail lines. Since that time, the Surface Transportation Board (“STB”) has succeeded the Interstate Commerce Commission as the agency with jurisdiction over these abandonment proceedings.

14. In response to this series of decisions, on May 26, 1999, Union Pacific filed a Notice of Intent to Complete Abandonment Proceedings for the Wallace ~~-and~~ Mullan Branch Branches with the STB, STB Docket No. AB-33 (Sub-No. 70). In that Notice, Union Pacific stated that on or about June 18, 1999, Union Pacific intended to file with the STB the environmental information required to complete the environmental compliance process and receive final approval to salvage the Wallace ~~-and~~ Mullan Branch rail lines. Among other things, the Notice provides background with respect to the extensive efforts Union Pacific has undertaken to respond to the six environmental conditions imposed by the ICC which are described in the Notice. On June 18, 1999, Union Pacific filed with the STB the environmental information required to complete the environmental compliance process and to receive final approval to salvage the Wallace ~~-and~~ Mullan Branch rail lines. The actions described in the SOW, when implemented, along with certain other actions, are intended to satisfy the six environmental conditions originally imposed by the ICC.

15. On July 29, 1999, the State and the Tribe filed with the STB an application for issuance of a Certificate of Interim Trail Use (“CITU”) for the Wallace ~~-and~~ Mullan ~~Branch~~ Branches right-of-way. A copy of the application is appended hereto as Appendix A. Union Pacific has filed a statement with the STB that it will accept a trail use condition and that it will negotiate an agreement with the State and Tribe relating thereto. A copy of that statement is appended hereto as Appendix B.

16. Concurrently with the negotiation of this Consent Decree, Union Pacific and the Tribe negotiated a consent decree to settle Coeur d’Alene Tribe v. Union Pacific Railroad Co., et al., (D. Idaho) Case No. CV 91-0342-N-EJL (the “UP-Tribe Consent Decree”). The UP-Tribe Consent Decree was lodged with the Court on September 27, 1999. The UP-Tribe Consent Decree is contingent upon agreement by the Plaintiffs and Union Pacific on this Consent Decree and the Court’s approval and entry of this Consent Decree.

17. Although the federal and tribal Natural Resource Trustees have not yet completed a natural resource damages assessment for the Coeur d’Alene Basin Environment, the federal and tribal Natural Resource Trustees have performed extensive studies of natural resource injuries in the Coeur d’Alene Basin Environment and have carefully considered the extent to which such injuries have resulted from releases at, in, from, on, or under the Coeur d’Alene Basin Environment. The federal, state and tribal Natural Resource Trustees have concluded that the settlement with the Settling Defendant set forth in this Consent Decree is reasonable and in the public interest, and constitutes appropriate action necessary to protect and restore injured natural resources.

18. Based on the information presently available to EPA, the State and the Tribe, EPA, the State and the Tribe believe that the Work will be properly and promptly conducted by

the Settling Defendant if conducted in accordance with the requirements of this Consent Decree and the SOW and its attachments.

19. Solely for the purposes of Section 113(j) of CERCLA, the Work (as defined below) to be performed by the Settling Defendant shall constitute a response action taken or ordered by the President.

20. This Consent Decree is entered into by the Parties to resolve in their entirety the claims and defenses asserted by the Parties against one another in ~~this action~~ these actions.

21. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith ~~and~~, implementation of this Consent Decree will expedite the cleanup of the Project Area and protection and restoration of injured natural resources in the Coeur d'Alene Basin Environment and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## II. JURISDICTION

22. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaints, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District.

## III. PARTIES BOUND

23. This Consent Decree applies to and is binding upon the United States, the State and the Tribe and upon Settling Defendant. Any change in ownership or corporate status of Settling Defendant including, but not limited to, any transfer of assets or real or personal

property, shall in no way alter Settling Defendant's responsibilities under this Consent Decree.

The Parties agree that STB issuance of a CITU for the Wallace ~~-and Mullan Branch~~ Branches right-of way and STB final approval of salvage of the Wallace ~~-and Mullan Branch~~ Branches rail lines are necessary prerequisites and conditions precedent to performance of the SOW pursuant to this Consent Decree. For purposes of the preceding sentence, the necessary prerequisites and conditions precedent shall be satisfied by:

(1) a final decision by the STB that the six environmental conditions referenced in Paragraph 13 of this Decree are satisfied. However, if, after such a final decision of the STB, there is a court order or any other administrative or judicial decision overturning the STB decision or enjoining or otherwise preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree, this condition precedent will not be met until such court order or other administrative or judicial decision overturning the STB decision or enjoining or otherwise preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree is vacated, reversed, overruled or otherwise overturned and the STB decision is affirmed or otherwise reinstated; and

(2) STB issuance of a CITU to the ROW Trail Owner(s). However, if, after such STB issuance of a CITU to the Trail Owners there is a court order or any other administrative or judicial decision overturning the STB decision or enjoining or otherwise preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree, this condition precedent will not be met until such court order or other administrative or judicial decision overturning the STB decision or enjoining or otherwise preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree is vacated, reversed, overruled or otherwise overturned and the STB decision is affirmed or otherwise reinstated.

In the event that either or both of the two conditions precedent identified in this Paragraph has not been satisfied, the Parties recognize that the failure of satisfying the condition precedent will constitute a Force Majeure event to the extent that it prevents Union Pacific from commencing salvage or otherwise performing Work in the Project Area and therefore agree to extend all deadlines under this Consent Decree for the length of time Union Pacific is prevented from commencing salvage or otherwise performing Work in the Project Area. In the event that there is a court order or other judicial or administrative decision overturning either or both of the STB decisions identified in the two conditions precedent, and all rights of appeal have been exhausted or a deadline for appeal of such decision has expired, and Union Pacific is thus permanently enjoined or prevented from commencing salvage or otherwise performing Work in the Project Area under the Decree, the Parties agree that this Consent Decree will automatically be null and void and without any effect. The Parties will notify the Court of this fact and request a conference to discuss further proceedings in this action.

24. Settling Defendant shall make a copy of this Consent Decree available to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing Settling Defendant with respect to the Project Area or the Work and shall require any such contractors to perform applicable work in conformity with the terms of this Consent Decree. Settling Defendant or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor of Settling Defendant shall be deemed to be in a contractual

relationship with the Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

#### IV. DEFINITIONS

25. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“Action Memo” or “Action Memorandum” shall mean the Action Memorandum relating to the EE/CA which was signed on October 13, 1999 by the Director, Environmental Cleanup Office, EPA Region 10, the State and the Tribe.

“Best efforts”, for purposes of Paragraph 46 of this Decree, may include the payment of reasonable sums of money as consideration.

“Bunker Hill Superfund Site” shall mean that area subject to the prior consent decree entered by the Court on ~~[INSERT DATE]~~ September 12, 1995 in United States v. Union Pacific, (D. Idaho), Case No. 95-0152-~~E~~ N-HLR.

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601 et seq.

“CITU” shall mean that Certificate of Interim Trail Use to be issued to the ROW Trail Owner(s) by the STB for the Wallace ~~-and~~ Mullan Branch Branches.

“Coeur d’Alene Basin Environment” shall mean: (1) the watershed of the South Fork and the North Fork of the Coeur d’Alene River, the main stem of the Coeur d’Alene River and its floodplain, including the lateral lakes and associated wetlands, ~~Lake Coeur d’Alene and the~~

~~Spokane River from the outfall from Lake Coeur d'Alene to the Post Falls dam; and Lake Coeur d'Alene;~~ (2) the ROW and all current or historical branches, sidings, spur tracks, bridges and structures thereon or connected thereto that are within or adjacent to the area described in subpart (1) of this definition, with the exception of the Excluded Rail Lines; and (3) all staging areas, Waste Material handling, storage or disposal areas, and other areas to be used by Settling Defendant in connection with performance of the Work as described in the SOW.

~~The geographic area of the Coeur d'Alene Basin Environment is set forth in the maps appended hereto as Appendix —.~~

~~“Consent~~ “Consent Decree” or “Decree” shall mean this decree and all appendices attached hereto (listed in Section ~~XIX~~) XXIX). In the event of conflict between this decree and any appendix, this decree shall control.

“Consultation” shall mean \_\_\_\_\_.

“Day” shall mean a calendar day unless expressly stated to be a Working Day.

“Working Day” shall mean a day other than a Saturday, Sunday, or federal, state or tribal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal, state or tribal holiday, the period shall run until the close of business of the next Working Day.

“Elements and Components of Work” shall mean the elements of work and their respective components as set forth in the SOW.

“Engineering Evaluation/Cost Analysis” or “EE/CA” shall mean the EPA engineering evaluation/cost analysis report for the response action under CERCLA for the Project Area issued on January 15, 1999 by the United States Environmental Protection Agency, Region 10, and for which the Action Memorandum was signed on October 13, 1999, and all attachments thereto. The EE/CA is appended hereto as Appendix —C.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

“Escrow Account” shall mean that account established pursuant to the Escrow Agreement appended hereto as Appendix \_\_.

“Excluded Rail Lines” shall mean that portion of the railroad right-of-way for: (i) the active rail line within certain areas of Plummer Junction and between Plummer Junction and Spokane, Washington that is located on the Reservation, and (ii) the abandoned line within certain areas of Plummer Junction and between Plummer Junction and Tekoa, Washington that is located on the Reservation. The precise location of the Excluded Rail Lines is set forth in the map appended hereto as Appendix \_\_\_\_.

“Future Response Costs” shall mean all response costs including, but not limited to, direct and indirect costs, that the United States, the State or the Tribe incurs on or after ~~[insert date]~~ September 1, 1999, July 1, 2000, and January 1, 2000, respectively, in reviewing or developing plans, reports, the State/Tribe Agreement, and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII (Response Action Review), IX (Access and Institutional Controls) (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation, except as otherwise provided in Paragraph ~~84~~ 85), XV (Emergency Response), and Paragraph ~~445~~ 123 of Section ~~XXI~~ XXII (Work Takeover). Future Response Costs shall also include all response costs, including direct and indirect costs, paid in connection with this Consent Decree by the United States ~~between \_\_\_\_\_, the State and the Tribe between September 1, 1999, July 1, 2000 and January 1, 2000, respectively,~~ and

the effective date of this Consent Decree, and all Interest on the Past Response Costs of the United States, the State and the Tribe that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from ~~September 1, 1999, July 1, 2000 and January 1, 2000, respectively,~~ to the date of entry of this Consent Decree.

“Governments” shall mean the United States, the State of Idaho and the Coeur d’Alene Tribe.

“Governments’ Project Coordinator” shall mean the Project Coordinator selected by the Plaintiffs that shall report to the EPA, State and the Tribe’s Project Coordinators.

“IDEQ” shall mean the Idaho Department of Health and Welfare, Division of Environmental Quality, and any successor departments or agencies of the State.

“Interest” shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

“Maintenance and Repair” shall mean all maintenance and repair activities which are to be performed or funded by Union Pacific as specified in the Maintenance and Repair Plan attached to the SOW as Attachment ~~F~~ E.

“Matters Addressed” in this Consent Decree shall mean all Work under this Consent Decree, all response actions taken or to be taken and all response costs incurred or to be incurred by the United States, the State, the Tribe or any other person or entity relating to the presence of Waste Materials at, or the release or threatened release of Waste Materials from: (i) the ROW; (ii) all staging areas and other areas to be used by Settling Defendant in connection with Performance of the Work as described in the SOW; and (iii) all handling, storage or disposal areas for Waste Materials approved under this Consent Decree. The term “Matters Addressed” also includes all Natural Resource Damages within the Coeur d’Alene Basin Environment.

“Matters Addressed” in this Consent Decree do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against Union Pacific coming within the scope of such reservations.

“Mine Waste” shall include jig and flotation tailings, mine waste rock, ores, and ore concentrates, all of which are derived from mining activities.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Natural Resource” shall mean any and all of those resources within the scope of Section 101(16) of CERCLA, 42 U.S.C. § 9601(16).

“Natural Resource Damages” shall mean any and all damages recoverable under Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), or Section 311 of the Clean Water Act, 33 U.S.C. § 1321, for injury to, destruction of, or loss of Natural Resources and includes without limitation any and all damages for restoration, replacement or acquisition of the equivalent injured, destroyed or lost natural resources, assessment costs, and compensable value damages and any other damages.

“Natural Resource Trustees” shall mean the U.S. Department of the Interior and the U.S. Department of Agriculture (the “Federal Natural Resource Trustees”), the Coeur d’Alene Tribe, and the State of Idaho.

“Operation and Maintenance - Trail” or “O&M-Trail” shall mean all operation, maintenance and repair activities to be performed or funded by the State and/or the Tribe in connection with the ROW Trail. “O&M-Trail” encompasses all activities in connection with the ROW Trail which are not specifically identified as “Maintenance and Repair.” “O&M

Trail” therefore includes but is not necessarily limited to: (i) service activities including: litter control, toilet cleaning and supply, miscellaneous cleaning, and trail sweeping; (ii) bridge inspections; (iii) preventive maintenance of the Chatcolet Bridge; (iv) maintenance and repair of bridge deck and guard rails, painting of buildings and amenities, and repair of amenities and other facilities; (v) other activities including: trail surface regrading within the Coeur d’Alene Indian Reservation, washing of steel bridges, and bridge deck replacement; and (vi) trail use management, including periodic patrols.

“**Oversight Scope**” shall mean the scope for oversight of the Work and for oversight of any other activities under this Consent Decree by the Plaintiffs for which Union Pacific is to be charged Future Response Costs. The **Oversight Scope** is appended hereto as Appendix \_\_\_\_\_. The purpose of this scope, among other things, is to avoid duplication of oversight and costs thereof.

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper case letter.

“Parties” shall mean the United States, the State of Idaho, the Coeur d’Alene Tribe, and the Settling Defendant.

“Past Response Costs” shall mean all response costs, including, but not limited to, direct and indirect costs, that the United States, the State, or the Tribe paid at or in connection with the Project Area through ~~[insert date]~~ August 31, 1999, June 30, 2000, and December 31, 1999, respectively, for which Union Pacific has not previously reimbursed them, plus Interest on all such unreimbursed costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such date.

“Performance Standards” shall mean those cleanup standards, standards of control, and other substantive requirements, criteria or limitations specified in the SOW to be achieved by Settling Defendant in implementing the Work.

“Plaintiffs” shall mean the United States, the State of Idaho and the Coeur d’Alene Tribe.

“Project Area” shall mean the main line and related sidings of the ROW except as noted below. Project Area shall also include those portions of Plummer Junction which are identified in the SOW as being a part of the Work. Those portions of Plummer Junction include the inactive rail lines within Plummer Junction that are owned or controlled by Union Pacific as well as the portion of the ROW that was abandoned in 1955. The 7.9 mile section of the ROW within the Bunker Hill Superfund Site has been addressed as part of the Bunker Hill Superfund Site Record of Decision (EPA, 1992), and except as otherwise specified in the SOW and its attachments is excluded from this definition. Project Area does not include: (1) the Excluded Rail Lines; (2) the spurs or connecting branch lines outside of the ROW; (3) the Wallace Yard between mile marker 78.5(?) and 79.8; (4) that portion of the Mullan ~~Branch~~ Branches between mile marker 7.15 and 7.6 that may include encroachments on the ROW from the Lucky Friday Mine ~~Haul Road~~ haul road; and (5) the areas identified on the RAD Drawings as possible encroachments on the ROW by the Hecla ~~Tailings~~ tailings impoundment, the Morning Mine ~~Rock Dump~~ rock dump, the Lucky Friday Mine ~~Waste Impoundment~~ waste impoundment and the Burns Yaak Mine ~~Dump~~ dump. The Project Area also includes all staging areas, Waste Material handling, storage and disposal areas within the Coeur d’Alene Basin Environment, and other areas to be used by Settling Defendant in connection with performance of the Work as described in the SOW.

“RAD Drawings” shall mean Response Action Design drawings which are Attachment D to the SOW.

“Response Action” shall mean those activities, except for Maintenance and Repair, to be undertaken by the Settling Defendant to implement the response action identified in the EE/CA and specified in the SOW.

“Reservation” shall mean the Coeur d’Alene Indian Reservation situated within Northern Idaho.

“Right-of-Way” or “ROW” shall mean: (1) the Wallace ~~Branch~~ Branches right-of-way which extends for 63.5 miles from mile marker 16.6 at Plummer Junction to mile marker 80.4 in Wallace; (2) the Mullan ~~Branch~~ Branches which extends 7.6 miles from mile marker 0 at Wallace to the east side of Mullan at mile marker 7.6; and (3) all sidings, bridges and structures thereon or connected thereto. The geographic scope of the ROW is shown on the RAD Drawings which are based on railroad valuation maps. In the event the RAD Drawings are unclear, the railroad valuation maps control.

“ROW Trail” shall mean the rights associated with the ROW to be managed under the State/Tribe Agreement for which the State and Tribe have applied to the STB for a CITU.

“ROW Trail Owner(s)” shall mean the State, the Tribe and/or any entities they jointly create pursuant to the State/Tribe Agreement for purposes of owning the ROW Trail and conducting Operation and Maintenance-Trail.

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Settling Defendant” shall mean Union Pacific Railroad Company.

“Slag Pile Area” or “SPA” shall mean that area made available by Plaintiffs for disposal of hazardous substances removed from the Coeur d’Alene Basin indicated on the map appended hereto as Appendix \_\_\_\_.

“State” shall mean the State of Idaho, its departments and agencies thereto.

“State/Tribe Agreement” shall mean that agreement between the Tribe and the State that describes the long-term cooperative partnership between the State and the Tribe with respect to ownership and management of the ROW Trail.

“Statement of Work” or “SOW” shall mean the written specification of the work to be performed pursuant to this Consent Decree together with all of its attachments, as set forth in Appendix \_\_\_ to this Consent Decree, and any modifications thereto made in accordance with this Consent Decree.

“Surface Transportation Board” or “STB” shall mean the board created within the federal Department of Transportation pursuant to 49 U.S.C. § 701 and any successor agency.

“Supervising Contractor” shall mean the principal contractor retained by the Settling Defendant to supervise and direct the implementation of the Work under this Consent Decree.

“Tribe” or “Tribal” shall mean the Coeur d’Alene Tribe of the Coeur d’Alene Indian Reservation situated within Northern Idaho.

“Union Pacific Railroad Company” or “Union Pacific” shall mean the Delaware corporation of that name.

“UP-Tribe Consent Decree” shall mean the consent decree lodged in Coeur d’Alene Tribe v. Union Pacific Railroad Co., et al., (D. Idaho) Case No. CV 91-0342-N-EJL on September 27, 1999.

“United States” shall mean the United States of America.

“Wallace Yard” shall mean that area located between milepost 78.5 (?) and 79.8 of the ROW.

“Waste Material” shall mean (1) Mine Waste; (2) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (3) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (4) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); (5) any “hazardous waste” under Section 1004(5) of RCRA, 42 U.S. § 6904(5), or hazardous constituent as defined at 40 C.F.R. § 260.10 pursuant to RCRA; and

(6) any “hazardous waste,” “solid waste” or “toxic” material under applicable Federal, State or Tribal law.

“Work” shall mean all activities Settling Defendant is required to perform under the Consent Decree as set forth in the SOW, except those required by Section XVI (Reimbursement of Response Costs and Payments in Settlement of Natural Resource Damages Claims) and Section ~~XXV~~ XXVI (Retention of Records).

## V. GENERAL PROVISIONS

26. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment in the Coeur d’Alene Basin by the performance of the response action identified in the EE/CA and specified in the SOW by the Settling Defendant, to contribute to restoration of habitat and natural resources, to resolve Settling Defendant’s liability for Natural Resource Damages within the Coeur d’Alene Basin Environment, to reimburse response costs of the Plaintiffs, and to resolve the claims of Plaintiffs against Settling Defendant as provided in this Consent Decree.

27. Commitments by the Parties

a. Settling Defendant shall comply with this Consent Decree and finance and perform the Work in accordance with this Consent Decree, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Settling Defendant and approved by EPA, the State, and the Tribe pursuant to this Consent Decree. Settling Defendant shall pay the United States, the State and the Tribe Natural Resource Damages as provided in this Consent Decree and pay the State and the Tribe certain additional sums as provided in this Consent Decree in connection with the ROW Trail. Settling Defendant shall also reimburse the United States, the State and the Tribe for Past Response Costs and Future Response Costs as provided in this Consent Decree. The Parties agree that STB issuance

of a CITU for the Wallace ~~-and Mullan Branch~~ Branches right-of way and STB final approval of salvage of the Wallace ~~-and Mullan Branch~~ Branches rail lines are necessary prerequisites and conditions precedent to performance of the SOW pursuant to this Consent Decree. For purposes of the preceding sentence, the necessary prerequisites and conditions precedent shall be satisfied by:

(1) a final decision by the STB that the six environmental conditions referenced in Paragraph 13 of this Decree are satisfied. However, if, after such a final decision of the STB, there is a court order or any other administrative or judicial decision overturning the STB decision or enjoining or otherwise preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree, this condition precedent will not be met until such court order or other administrative or judicial decision overturning the STB decision or enjoining or otherwise preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree is vacated, reversed, overruled or otherwise overturned and the STB decision is affirmed or otherwise reinstated; and

(2) STB issuance of a CITU to the ROW Trail Owner(s). However, if, after such STB issuance of a CITU to the Trail Owners there is a court order or any other administrative or judicial decision overturning the STB decision or enjoining or otherwise preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree, this condition precedent will not be met until such court order or other administrative or judicial decision overturning the STB decision or enjoining or otherwise preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree is vacated, reversed, overruled or otherwise overturned and the STB decision is affirmed or otherwise reinstated.

In the event that either or both of the two conditions precedent identified in this Paragraph has not been satisfied, the Parties recognize that the failure of satisfying the condition precedent will constitute a Force Majeure event to the extent that it prevents Union Pacific from commencing salvage or otherwise performing Work in the Project Area and therefore agree to extend all deadlines under this Consent Decree for the length of time Union Pacific is prevented from commencing salvage or otherwise performing Work in the Project Area. In the event that there is a court order or other judicial or administrative decision overturning either or both of the STB decisions identified in the two conditions precedent, and all rights of appeal have been exhausted or a deadline for appeal of such decision has expired, and Union Pacific is thus permanently enjoined or prevented from commencing salvage or otherwise performing Work in the Project Area under the Decree, the Parties agree that this Consent Decree will automatically be null and void and without any effect. The Parties will notify the Court of this fact and request a conference to discuss further proceedings in this action.

b. As provided in Paragraph 78 of this Decree, Settling Defendant will pay \$2,600,000 to the ROW Trail Owner(s). The ROW Trail Owner(s) shall use such funds and any interest or investment proceeds therefrom to perform or fund Operation and Maintenance - Trail pursuant to the State/Tribe Agreement. The ROW Trail Owner(s) have agreed to perform or fund Operation and Maintenance - Trail, and Settling Defendant shall have no further obligations to perform or fund Operation and Maintenance - Trail under this Decree.

c. The Plaintiffs shall allow Settling Defendant to place material removed from the Project Area pursuant to the SOW in the Slag Pile Area within the Bunker Hill Superfund Site through September 1, 2001. In addition, if this location is generally made available by Plaintiffs for the placement of materials from the Coeur d'Alene Basin after this date, or if other locations are made generally available by Plaintiffs for such placement of

materials, they will also be made available to Settling Defendant. Settling Defendant will be responsible for any additional incremental costs, i.e., costs in addition to those which would otherwise have been incurred, associated with placement of Project Area materials at these locations as specified in the SOW. The conditions for Settling Defendant's use of the Slag Pile Area for disposal are set forth in the SOW.

28. Compliance With Applicable Law. All activities undertaken by Settling Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal, state and tribal laws and regulations. To the extent practicable considering the exigencies of the situation, the Work shall attain applicable or relevant and appropriate requirements under federal, state and tribal environmental or facility siting laws as set forth in the EE/CA. The activities conducted pursuant to this Consent Decree, ~~[if approved by EPA, after consultation with the State and the Tribe govt's to provide language]~~ if approved by Plaintiffs, shall be considered to be consistent with the NCP.

29. Permits

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no federal, State or Tribal permit shall be required for any portion of the Work conducted entirely On-site as that term is defined in Section ~~4.2.12~~ 2.0.7 of the SOW. Where any portion of the Work that is not On-site requires a federal, State or Tribal permit or approval, Settling Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. Settling Defendant may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal, State or Tribal statute or regulation.

30. Notice to Successors-in-Title

a. With respect to any property owned or controlled by the Settling Defendant that is located within the Project Area, within fifteen (15) days after the entry of this Consent Decree, the Settling Defendant shall submit to Plaintiffs for review and approval a notice to be filed with the Records' Offices, in Shoshone, Kootenai, and Benewah Counties, State of Idaho, which shall provide notice to all successors-in-title that the property is part of the Project Area, that EPA, the State and the Tribe selected a response action for the Project Area on October 13, 1999, and that Union Pacific has entered into a Consent Decree requiring implementation of the response action. Such notices shall identify the United States District Court in which the Consent Decree was filed, the ~~name~~ names and civil action ~~number~~ numbers of ~~this case~~ these cases, and the date the Consent Decree was entered by the Court. The Settling Defendant shall record the notices within ten (10) days of Plaintiffs' approval of the notices. The Settling Defendant shall provide Plaintiffs with a certified copy of the recorded notices within ten (10) days of recording such notices.

b. At least thirty (30) days prior to the conveyance of any interest in property located within the Project Area including, but not limited to, fee interests, leasehold interests, and mortgage interests, the Settling Defendant conveying the interest shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Project Area (hereinafter referred to as "access easements") pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as "restrictive easements")

pursuant to Section IX (Access and Institutional Controls). At least thirty (30) days prior to such conveyance, the Settling Defendant conveying the interest shall also give written notice to EPA, the State and the Tribe of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee. Notice shall not be required under this provision as a result of STB approval of the abandonment of the Wallace ~~-and Mullan Branch~~ Branches or issuance of a Certificate of Interim Trail Use for the ROW and subsequent transfer of any property interest to the State and Tribe.

c. In the event of any such conveyance, the Settling Defendant's obligations under this Consent Decree, including, but not limited to, its obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and Institutional Controls) of this Consent Decree, shall continue to be met by the Settling Defendant. In no event shall the conveyance release or otherwise affect the liability of the Settling Defendant to comply with all provisions of this Consent Decree, absent the prior written consent of EPA, the State and the Tribe. If the United States, the State and the Tribe approve, the grantee may perform some or all of the Work under this Consent Decree.

31. Upon completion of the Work, Settling Defendant will transfer all of its right, title and interest, if any, to the ROW, by means of quitclaim deed(s) to the ROW Trail Owner(s). The quitclaim deed(s) will be recorded by Settling Defendant in Shoshone, Kootenai or Benewah Counties, State of Idaho, as appropriate.

## VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

### 32. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendant pursuant to Sections VI (Performance of the Work by Settling Defendant), VII (Response Action Review),

VIII (Qualify Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor. McCulley, Frick & Gilman, Inc. has been selected by Settling Defendant and approved by Plaintiffs as Supervising Contractor. If at any time hereafter, Settling Defendant proposes to change its Supervising Contractor, Settling Defendant shall give such notice to Plaintiffs and must obtain an authorization to proceed before the new Supervising Contractor performs, directs or supervises any Work under this Consent Decree.

b. If Plaintiffs disapprove a proposed Supervising Contractor, Plaintiffs will notify Settling Defendant in writing. Settling Defendant shall submit to Plaintiffs a list of contractors, including the qualifications of each contractor, that would be acceptable to it within thirty (30) days of receipt of Plaintiffs' disapproval of the contractor previously proposed. Plaintiffs will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendant may select any contractor from that list that is not disapproved and shall notify Plaintiffs of the name of the contractor selected within twenty-one (21) days of Plaintiffs' authorization to proceed.

c. If Plaintiffs fail to provide written notice of authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendant from meeting one or more deadlines in a plan approved by Plaintiffs pursuant to this Consent Decree, Settling Defendant may seek relief under the provisions of Section XVIII (Force Majeure) hereof.

33. Modification of the SOW or Related Work Plans

a. If ~~EPA, with agreement by the State and the Tribe, determines~~ Plaintiffs determine that modification to the work specified in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry

out and maintain the effectiveness of the Response Action, ~~EPA~~ Plaintiffs may require that such modification be incorporated in the SOW and/or such work plans. Provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the ~~seope~~ Scope of the Response Action.

b. For the purposes of this Paragraph 33 and Paragraphs 69 and 70 only, the “Scope of the Response Action” identified in the EE/CA and specified in the SOW is:

- (1) Removal and disposal of Mine Waste, including accumulations of mining concentrates in the Project Area;
- (2) Salvage of track, ties and other track materials from the Project Area;
- (3) Repair of flood damage in the Project Area;
- (4) Removal of contaminated materials and debris, including railroad ties, from the Project Area;
- (5) Placement of asphalt barriers over the former mainline track area and other areas within the Project Area;
- (6) Placement of gravel and/or vegetated barriers over contamination left in place in residential areas, sidings, and other identified areas where people might otherwise come in contact with hazardous substances;
- (7) Placement of access controls within the Project Area;
- (8) Creation of educational programs for federal, state and tribal employees and contractors working in the Project Area, and for recreational users and other members of the public who come onto the Project Area;

- (9) Procurement and installation of trail amenities;
- (10) Procurement and installation of advisory and safety signs;
- (11) Modification and renovation of bridges along the Project Area sufficient to have the bridges in good operating condition for use as part of a recreational trail;
- (12) Maintenance and repair, ~~as defined above in Section IV.~~

~~(13) Operation and Maintenance Trail, as defined above in Section IV.~~ of the protective barriers, access controls or any other items constructed as part of the Response Action to manage exposure and protect barriers prior to Certification of Completion of the Response Action as provided for in Paragraph 69.b.

c. If Settling Defendant objects to any modification determined by ~~EPA~~ Plaintiffs to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section ~~XIX XX~~ (Dispute Resolution), ~~Paragraph 94~~ Paragraphs 96, 99 and 102, as appropriate. The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

d. Settling Defendant shall implement any work required by any modifications incorporated in the SOW and/or in work plans developed pursuant to the SOW in accordance with this Paragraph.

e. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

34. Settling Defendant acknowledges and agrees that nothing in this Consent Decree or the SOW constitutes a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the SOW will achieve the Performance Standards.

However, the Parties anticipate that compliance with the work requirements set forth in the SOW will achieve the Performance Standards.

35. Settling Defendant shall, prior to any shipment of Waste Material from the Project Area to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material.

a. The Settling Defendant shall include in the written notification, the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Settling Defendant shall notify the state in which the planned receiving facility is located of major changes in the shipping plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by the Settling Defendant following the award of the contract for SOW implementation. The Settling Defendant shall provide the information required by Paragraph 35.a. as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

## VII. RESPONSE ACTION REVIEW

36. Periodic Review. Settling Defendant shall conduct any studies and investigations as requested by EPA, in order to permit EPA in ~~consultation~~ Consultation with the State and the Tribe, to conduct reviews as set forth in the SOW of whether the Response Action is protective of human health and the environment at least every five (5) years as required for remedial actions by Section 121(c) of CERCLA and any applicable regulations.

37. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Response Action is not protective of human health and the environment, EPA, after ~~consultation~~ Consultation with the State and the Tribe, may select further response actions for the Project Area in accordance with the requirements of CERCLA and the NCP.

38. Opportunity to Comment. Settling Defendant and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Paragraph 36 and to submit written comments for the record during the comment period.

39. Settling Defendant's Obligation to Perform Further Response Actions. If EPA selects further response actions for the Project Area, the Settling Defendant shall undertake such further response actions to the extent that the reopener conditions in Paragraphs ~~440-444~~ 118-119 (Plaintiffs' reservations of liability based on unknown conditions or new information) are satisfied. Settling Defendant may invoke the procedures set forth in Section ~~XIX~~ XX (Dispute Resolution) to dispute (1) Plaintiffs' determination that the reopener conditions of Paragraphs ~~440-444~~ 118-119 of Section ~~XXI~~ XXII (Covenants Not to Sue by Plaintiffs) are satisfied, (2) EPA's determination that the Response Action is not protective of human health and the environment, or (3) EPA's selection of further response actions. Disputes pertaining to whether the Response Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph ~~94~~ 96.

40. Submissions of Plans. If Settling Defendant is required to perform the further response actions pursuant to Paragraph 39, it shall submit a plan for such work to EPA for approval in accordance with the procedures set forth in Section XI (EPA Approval of Plans and Other Submissions) and shall implement the plan approved by EPA in accordance with the provisions of this Consent Decree.

### VIII. QUALITY ASSURANCE, SAMPLING ~~and~~ AND DATA ANALYSIS

41. Settling Defendant shall use quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance and monitoring samples in accordance with the SOW.

42. Upon request, the Settling Defendant shall allow split or duplicate samples to be taken by Plaintiffs or their authorized representatives. Settling Defendant shall notify Plaintiffs not less than fourteen (14) days in advance of any sample collection activity unless shorter notice is agreed to by ~~EPA~~ the Governments' Project Coordinator. In addition, Plaintiffs shall have the right to take any additional samples that EPA, the State or the Tribe deem necessary. Upon request, Plaintiffs shall allow the Settling Defendant to take split or duplicate samples of any samples they take as part of the Plaintiffs' oversight of the Settling Defendant's implementation of the Work.

43. Settling Defendant shall submit to Plaintiffs copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendant with respect to the implementation of the Work unless ~~EPA agrees~~ Plaintiffs agree otherwise.

44. Notwithstanding any provision of this Consent Decree, Plaintiffs hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, applicable state and tribal law, and any other applicable statutes or regulations.

### IX. ACCESS AND INSTITUTIONAL CONTROLS

45. If the Project Area, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree in accordance with the SOW, is owned or controlled by the Settling Defendant, Settling Defendant shall:

a. commencing on the date of lodging of this Consent Decree, provide the Plaintiffs and their representatives, including ~~EPA and its~~ their contractors, with access at all reasonable times to the Project Area, or such other property, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States, the State or the Tribe;
- (3) Conducting investigations relating to contamination at or near the Project Area;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Project Area;
- (6) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or its agents, consistent with Section ~~XXIV~~ XXV (Access to Information); and
- (7) Assessing Settling Defendant's compliance with this Consent Decree.

b. commencing on the date of lodging of this Consent Decree, refrain from using the Project Area, or such other property, in any manner that would interfere with or adversely affect the integrity or protectiveness of the Response Action to be implemented pursuant to the SOW and this Consent Decree.

46. If the Project Area, or any other property where access and/or land/water use restrictions are needed to implement the SOW, is owned or controlled by persons other than the Parties to this Decree, then Settling Defendant shall use best efforts to secure from such persons:

a. an agreement to provide access thereto for Settling Defendant and Plaintiffs, as well as for their representatives (including contractors), for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 45.a<sub>2</sub> of this Consent Decree; and

b. an agreement, enforceable by the Settling Defendant and the United States to abide by the obligations and restrictions established by Paragraph 45.b<sub>2</sub> of this Consent Decree, or that are otherwise necessary to implement, ensure non-interference with, or ensure the protectiveness of the response action measures to be performed pursuant to this Consent Decree.

47. If any access or land/water use restriction agreements required by Paragraph 46 of this Consent Decree are not obtained within forty-five (45) days of the date of entry of this Consent Decree, Settling Defendant shall promptly notify the Plaintiffs in writing, and shall include in that notification a summary of the steps that Settling Defendant has taken to attempt to comply with Paragraph 46 of this Consent Decree. The Plaintiffs may, as they, individually or collectively, deem appropriate, assist Settling Defendant in obtaining access or land/water use restrictions, either in the form of contractual agreements or in the form of easements running with the land. Settling Defendant shall reimburse the Plaintiffs in accordance with the procedures in Section XVI (Reimbursement of Response Costs), for costs incurred, direct or indirect, by the Plaintiffs in obtaining such access and/or land/water use restrictions, including, but not limited to, the reasonable cost of attorney time and the amount of monetary consideration paid or just compensation, except as otherwise provided in Paragraph 85 of this Decree. Plaintiffs shall use best efforts to coordinate their efforts, if any, to obtain access.

48. If ~~EPA determines~~ Plaintiffs determine that land/water use restrictions in the form of state, tribal, or local laws, regulations, ordinances or other governmental controls are needed to implement the Response Action, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendant shall cooperate with the Plaintiffs' efforts to secure such governmental controls.

49. Notwithstanding any provision of this Consent Decree, Plaintiffs retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

#### X. REPORTING REQUIREMENTS

50. In addition to any other requirement of this Consent Decree, Settling Defendant shall submit to Plaintiffs written reports as set forth in the SOW.

51. The Settling Defendant shall notify Plaintiffs of any proposed change in the schedule as set forth in the SOW for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven (7) days prior to the performance of the activity.

52. Upon the occurrence of any event during performance of the Work that Settling Defendant is required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA), Settling Defendant shall within 24 hours of the onset of such event orally notify the Governments' Project Coordinator, in the event of the unavailability of the Governments' Project Coordinator, the EPA Project Coordinator, or, in the event that neither the Governments' Project Coordinator nor EPA Project Coordinator is available, the Emergency Response Unit, Region 10, United States Environmental

Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

53. Within twenty (20) days of the onset of such an event, Settling Defendant shall furnish to Plaintiffs a written report, signed by the Settling Defendant's Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within thirty (30) days of the conclusion of such an event, Settling Defendant shall submit a report setting forth all actions taken in response thereto.

54. Settling Defendant shall submit ~~fourteen~~ (14) copies of all plans, reports, and data required by the SOW to Plaintiffs.

55. All reports and other documents submitted by Settling Defendant to EPA, the State or the Tribe (other than periodic progress reports under the SOW) which purport to document Settling Defendant's compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendant, who may be Settling Defendant's Project Coordinator.

#### XI. APPROVAL OF PLANS AND OTHER SUBMISSIONS

56. After review of any plan, report or other item which is required to be submitted for approval pursuant to the Consent Decree, ~~EPA, after reasonable opportunity for review and comment by the State and the Tribe,~~ Plaintiffs shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendant modify the submission; or (e) any combination of the above. However, ~~EPA~~ Plaintiffs shall not modify a submission without first providing Settling Defendant at least one notice of deficiency and an opportunity to cure within fourteen (14) days except where to do so would cause serious disruption to the Work or where previous submissions have been

disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

57. In the event of approval, approval upon conditions, or modification by ~~EPA~~ Plaintiffs, pursuant to Paragraph 56(a),(b), or (c), Settling Defendant shall proceed to take any action required by the plan, report, or other item, as approved or modified by ~~EPA~~ Plaintiffs subject only to its right to invoke the Dispute Resolution procedures set forth in Section ~~XIX~~ XX (Dispute Resolution) with respect to the modifications or conditions made by ~~EPA~~ Plaintiffs. In the event that ~~EPA modifies~~ Plaintiffs modify the submission to cure the deficiencies pursuant to Paragraph 56(c) and the submission has a material defect, ~~EPA retains its~~ Plaintiffs retain the right to seek stipulated penalties, as provided in Section ~~XX~~ XXI (Stipulated Penalties).

58.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 56(d), Settling Defendant shall, within fourteen (14) days or such longer time as specified by ~~EPA~~ Plaintiffs in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section ~~XX~~ XXI, shall accrue during the fourteen (14)-day period or otherwise specified period. Stipulated penalties shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 59 and 60.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 56(d), Settling Defendant shall proceed, at the direction of ~~EPA~~ Plaintiffs, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendant of any liability for stipulated penalties under Section ~~XX~~ XXI (Stipulated Penalties) as to any deficient portion.

59. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by ~~EPA, EPA~~ Plaintiffs, Plaintiffs may again require the Settling Defendant to correct the deficiencies, in accordance with the preceding Paragraphs. ~~EPA~~ Plaintiffs also ~~retains~~ retain the right to modify or develop the plan, report or other item to the extent such modification or development is consistent with the response action identified in the EE/CA, specified in the SOW and selected in the Action Memo. Settling Defendant shall implement any such plan, report, or item as modified or developed by ~~EPA~~ Plaintiffs, subject only to its right to invoke the procedures set forth in Section ~~XIX~~ XX (Dispute Resolution).

60. If upon resubmission, a plan, report, or item is disapproved or modified by ~~EPA~~ Plaintiffs due to a material defect, Settling Defendant shall be deemed to have failed to submit such a plan, report, or item timely and adequately unless the Settling Defendant invokes the dispute resolution procedures set forth in Section ~~XIX~~ XX (Dispute Resolution) and ~~EPA's~~ Plaintiffs' action is overturned pursuant to that Section. The provisions of Section ~~XIX~~ XX (Dispute Resolution) and Section ~~XX~~ XXI (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If ~~EPA's~~ Plaintiffs' disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section ~~XX~~ XXI.

61. All plans, reports, and other items required to be submitted to ~~EPA~~ Plaintiffs under the Consent Decree shall, upon approval or modification by ~~EPA~~ Plaintiffs, be enforceable under this Consent Decree. In the event ~~EPA approves or modifies~~ Plaintiffs approve or modify a portion of the plan, report, or other item required to be submitted to ~~EPA~~ Plaintiffs under the Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

## XII. PROJECT COORDINATORS

62. Within twenty (20) days of lodging this Consent Decree, Settling Defendant, the State, the Tribe and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least five (5) working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Settling Defendant's Project Coordinator shall be subject to disapproval by ~~EPA~~ Plaintiffs and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendant's Project Coordinator shall not be an attorney for the Settling Defendant. He or she may assign other representatives, including other contractors, to serve as a Project Area representative for oversight of performance of daily operations during remedial activities.

63. Plaintiffs may designate other representatives, including, but not limited to, EPA, State and Tribal employees, and federal, State and Tribal contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree consistent with the Oversight Scope. The Governments' Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R., Part 300. In addition, the Governments' Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Project Area constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to the release or threatened release of Waste Material.

64. The Governments' Project Coordinator and the Settling Defendant's Project Coordinator will meet, at a minimum, on a monthly basis. This meeting may be held by telephone conference.

### XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

65. Within thirty (30) days of entry of this Consent Decree, Settling Defendant shall establish and maintain financial security in the amount of \$[insert estimated cost of Work] in one or more of the following forms.

- a. a surety bond guaranteeing performance of the Work;
- b. one or more irrevocable letters of credit equaling the total estimated cost of the Work;
- c. a trust fund;
- d. a guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with the Settling Defendant; or
- e. a demonstration that Settling Defendant satisfies the requirements of 40 C.F.R. Part 264.143(f).

66. If the Settling Defendant seeks to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 65.d. of this Consent Decree, Settling Defendant shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendant seeks to demonstrate its ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 65.d. or 65.e., it shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the effective date of this Consent Decree. In the event that EPA, after a reasonable opportunity for review and comment by the State and the

~~Tribe, determines~~ Plaintiffs determine at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendant shall, within thirty (30) days of receipt of notice of ~~EPA's~~ Plaintiffs' determination, obtain and present to ~~EPA~~ Plaintiffs for approval one of the other forms of financial assurance listed in Paragraph 65 of this Consent Decree. Settling Defendant's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

67. If Settling Defendant can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 65 above after entry of this Consent Decree, Settling Defendant may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Settling Defendant shall submit a proposal for such reduction to ~~EPA~~ Plaintiffs, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by ~~EPA~~ Plaintiffs. In the event of a dispute, Settling Defendant may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

68. Settling Defendant may change the form of financial assurance provided under this Section at any time, upon notice to and approval by ~~EPA~~ Plaintiffs, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Settling Defendant may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

#### XIV. CERTIFICATION OF COMPLETION

##### 69. Completion of the Response Action

a. Within ninety (90) days after Settling Defendant concludes that all of the Response Action has been fully performed, or a portion of the Response Action as set forth in

Section ~~1.4.18~~ of the SOW has been fully performed, and the Performance Standards have been attained, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant, EPA, the State and the Tribe. If, after the pre-certification inspection, the Settling Defendant still believes that all of the Response Action, or the portion of the Response Action for which certification has been requested as provided in Section ~~1.4.18~~ of the SOW, has been fully performed and the Performance Standards have been attained, it shall submit a written report requesting certification to ~~EPA~~ Plaintiffs for approval, with a copy to the State and the Tribe, pursuant to Section XI ~~(EPA)~~ (Approval of Plans and Other Submissions) within thirty (30) days of the inspection. In the report, a registered professional engineer and the Settling Defendant's Project Coordinator shall state that all of the Response Action, or the portion thereof for which certification has been requested, has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendant or the Settling Defendant's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after completion of the pre-certification inspection and receipt and review of the written report, ~~EPA, after reasonable opportunity to review and comment by the State and the Tribe,~~ ~~determines~~ Plaintiffs determine that the Response Action, or the portion thereof for which certification has been requested, or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, ~~EPA~~ Plaintiffs will notify Settling Defendant in writing of the activities that must be undertaken by

Settling Defendant pursuant to this Consent Decree to complete the Response Action or the portion for which certification has been requested and achieve the Performance Standards. Provided, however, that EPA Plaintiffs may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the “Scope of the Response Action” as that term is defined in Paragraph 33.b. of this Decree. EPA Plaintiffs will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to EPA Plaintiffs for approval pursuant to Section XI (~~EPA~~ Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to its right to invoke the dispute resolution procedures set forth in Section ~~XIX~~ XX (Dispute Resolution).

b. If ~~EPA concludes~~ Plaintiffs conclude, based on the initial or any subsequent report requesting Certification of Completion ~~and with agreement by the State and the Tribe~~, that the Response Action, or the portion thereof for which certification has been requested, has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA Plaintiffs will so certify in writing to Settling Defendant. However, this certification shall constitute the Certification of Completion of the Response Action for purposes of this Consent Decree, including, but not limited to, Section ~~XXI~~ XXII (Covenants Not to Sue by Plaintiffs) only when all portions of the Response Action have been certified by EPA Plaintiffs. Certification of Completion of the Response Action shall not affect Settling Defendant’s obligations under this Consent Decree.

#### 70. Completion of the Work

a. Within ninety (90) days after Settling Defendant concludes that an “Element of Work” as defined in the SOW has been fully performed, Settling Defendant shall

schedule and conduct a pre-certification inspection to be attended by Settling Defendant, EPA, the State and the Tribe. If, after the pre-certification inspection, the Settling Defendant still believes that the Element of Work has been fully performed, Settling Defendant shall submit a written report by a registered professional engineer stating that such Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendant or the Settling Defendant's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the written report, ~~EPA, after reasonable opportunity to review and comment by the State and the Tribe, determines~~ Plaintiffs determine that any portion of such Element of Work has not been completed in accordance with this Consent Decree, ~~EPA~~ Plaintiffs will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Decree to complete such Element of Work. Provided, however, that ~~EPA~~ Plaintiffs may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "Scope of the Response Action" as that term is defined in Paragraph 33.b. of this Decree. ~~EPA~~ Plaintiffs will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to ~~EPA~~ Plaintiffs for approval pursuant to Section XI (~~EPA~~ Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedule established therein, subject to its right to invoke the dispute resolution procedures set forth in Section ~~XIX~~ XX (Dispute Resolution).

b. If ~~EPA concludes~~ Plaintiffs conclude, based on the initial or any subsequent request for Certification of Completion by Settling Defendant ~~and with agreement by the State and the Tribe~~, that the Element of Work has been performed in accordance with this Consent Decree, ~~EPA~~ Plaintiffs will so notify the Settling Defendant in writing.

#### XV. EMERGENCY RESPONSE

71. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Project Area that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendant shall, subject to Paragraph 72, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the Governments' Project Coordinator, or, if the Governments' Project Coordinator is unavailable, EPA's Project Coordinator. If neither of these persons is available, the Settling Defendant shall notify the EPA Emergency Response Unit, Region 10, at the 24-hour emergency response phone: 1-800-424-8802. Settling Defendant shall take such actions in consultation with the Governments' Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Settling Defendant fails to take appropriate response action as required by this Section, and EPA or, as appropriate, the State or Tribe, take such action instead, Settling Defendant shall reimburse EPA, the State and the Tribe all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Reimbursement of Response Costs).

72. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States, the State, and the Tribe to a) take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an

actual or threatened release of Waste Material on, at, or from the Project Area, or b) direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Project Area, subject to Section ~~XXI~~ XXII (Covenants Not to Sue by Plaintiffs).

**XVI. REIMBURSEMENT OF RESPONSE COSTS AND PAYMENTS  
IN SETTLEMENT OF NATURAL RESOURCE DAMAGES CLAIMS**

73. Past Response Costs. Within thirty (30) days of the effective date of this Consent Decree, Settling Defendant shall:

a. Pay to the EPA Hazardous Substance Superfund [**\$292,222.85 EPA costs through September 1, 1999-RWL Reviewing**] in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number \_\_\_\_\_, the EPA Region and Site/Spill ID #103D, and DOJ case number 90-11-3-128L. Payment shall be made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney’s Office for the District of Idaho following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. Settling Defendant shall send notice that such payment has been made to the United States as specified in Section ~~XXVI~~ XXVII (Notices and Submissions) and to the following:

Regional Financial Management Officer  
U.S. EPA Region 10  
1200 Sixth Avenue  
Seattle, WA 98101

b. Pay to the State \$ \_\_\_\_\_ United States Department of the Interior  
**[\$58,894.65 - RWL Reviewing]** in reimbursement of Past Response Costs, by FedWire

Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number \_\_\_\_\_, the DOI Account Number 14x5198 (NRDAR), and DOJ case number 90-11-3-128L. Payment shall be made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney’s Office for the District of Idaho following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. Settling Defendant shall send notice that such payment has been made to the United States as specified in Section XXVII (Notices and Submissions) and to the following:

Department of the Interior  
National Business Center  
Division of Financial Management Services  
Branch of Accounting Operations (Mailstop 1313)  
1849 C Street, N.W.  
Washington, DC 20240

c. \_\_\_\_\_ Pay to the Department of Agriculture [**\$14,080.54 - RWL Reviewing**] in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number \_\_\_\_\_, and DOJ case number 90-11-3-128-L. Payment shall be made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney’s Office for the District of Idaho following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. Settling Defendant shall send notice that such payment has been made to the United States as specified in Section XXVII (Notices and Submissions) and to the following:

Bill Putnam  
Forest Service-U.S. Department of Agriculture

Northern Region  
P.O. Box 7669  
Missoula, MT 59807

d. Pay to the United States Treasury [\$221,624.92 - RWL Reviewing] in  
reimbursement of Department of Justice Past Response Costs, by FedWire Electronic Funds  
Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with  
current electronic funds transfer procedures, referencing U.S.A.O. file number \_\_\_\_\_, and  
DOJ case number 90-11-3-128L. Payment shall be made in accordance with instructions  
provided to the Settling Defendant by the Financial Litigation Unit of the United States  
Attorney's Office for the District of Idaho following lodging of the Consent Decree. Any  
payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited  
on the next business day. Settling Defendant shall send notice that such payment has been made  
to the United States as specified in Section XXVII (Notices and Submissions) and to the  
following:

Chief Environmental Enforcement Division  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611  
Re: DJ #90-11-3-128L

e. Pay to the State [\$259,000 - to be discussed] in the form of a check or  
checks made payable to \_\_\_\_\_ IDEQ, in reimbursement of State Past Response  
Costs and projected Future Response Costs through June 30, 1999 2000 [RWL checking with  
UP]. The Settling Defendant shall send the check(s) to \_\_\_\_\_. IDEQ, Fiscal Office,  
1410 N. Hilton, Coeur d'Alene, ID 83706-1253.

e f. Union Pacific periodically has reimbursed the Tribe for Past Response  
Costs and on September 21, 1999 provided to the Tribe a check in the amount of \$276,487.00 to

reimburse Past Response Costs incurred by the Tribe through August 1999 and projected Future Response Costs through December 31, 1999.

74. Future Response Costs.

a. Settling Defendant shall reimburse the EPA Hazardous Substance

Superfund for all Future Response Costs not inconsistent with the National Contingency Plan.

With respect to Future Response Costs incurred by the Government Project Coordinator and its team for construction and long term oversight, Settling Defendant shall reimburse the EPA

Hazardous Substance Superfund for such oversight costs that are not inconsistent with the

**Oversight Scope [gov't checking- need to see Oversight Scope ASAP].** The United States

will send Settling Defendant a bill requiring payment that includes a Superfund Cost

Organization Recovery Enhancement System report on a periodic basis. Settling Defendant

shall make all payments within forty-five (45) days of Settling Defendant's receipt of each bill

requiring payment except as otherwise provided in Paragraph 75. The Settling Defendant shall

make all payments required by this Paragraph in the form of a certified or cashier's check or

checks made payable to "EPA Hazardous Substance Superfund" and referencing the EPA

Region and Site/Spill ID #103D, the DOJ case number 90-11-3-128L, and the name and address

of the party making payment. The Settling Defendant shall send the check(s) to:

U.S. Environmental Protection Agency  
EPA Hazardous Substance Superfund  
P.O. Box 360903M  
Pittsburgh, Pennsylvania 15251

and shall send copies of the check(s) to the United States as specified in Section ~~XXVI~~ XXVII

(Notices and Submissions) and to:

Regional Financial Management Officer  
U.S. EPA Region 10  
1200 Sixth Avenue  
Seattle, WA 98101

b. Settling Defendant shall pay the State for all State Future Response Costs not inconsistent with the National Contingency Plan. With respect to State Future Response Costs incurred by the Government Project Coordinator and its team, for construction and long term oversight, Settling Defendant shall reimburse the State for such oversight costs that are not inconsistent with the **Oversight Scope**. Each year, no later than April 1, the State shall provide Settling Defendant a detailed written budget for the following budget year. No later than forty-five (45) days prior to the beginning of each budget year (July 1), except as otherwise provided in Paragraph 75, the Settling Defendant shall fund the first two quarters of the estimated budget. No later than forty-five (45) days after the end of each quarter, the State shall provide Settling Defendant with an accounting of actual response costs incurred in such quarter. Payments by Settling Defendant of the third and fourth quarter budget shall be made no later than forty-five (45) days prior to each such quarter, except as otherwise provided in Paragraph 75, and shall be reconciled against actual response costs incurred in the preceding quarters. Settling Defendant shall pay only those costs not inconsistent with the National Contingency Plan and the Oversight Scope. Payments required by this Paragraph shall be made by check made payable to “Idaho Division of Environmental Quality” and shall reference this Consent Decree.

c. Settling Defendant shall reimburse the Tribe for all Tribal Future Response Costs not inconsistent with the National Contingency Plan from January 1, 2000 adjusted for any shortfall or surplus funds provided for the September 1, 1999 through December 31, 1999 projection period referenced in Paragraph 73.c. ~~above that are not inconsistent with the~~

~~National Contingency Plan~~ 73.f. above. With respect to Tribal Future Response Costs incurred by the Government Project Coordinator and its team, for construction and long term oversight, Settling Defendant shall reimburse the Tribe for such oversight costs that are not inconsistent with the **Oversight Scope**. The Tribe will send Settling Defendant a bill requiring payment that includes a Tribally-prepared cost summary, which includes direct and indirect costs incurred by the Tribe and its contractors on a periodic basis. Settling Defendant shall make all payments within forty-five (45) days of Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in Paragraph 75. The Settling Defendant shall make all payments to the Tribe required by this Paragraph by check made payable to ~~[Tribe to provide instructions]~~. Coeur d'Alene Tribe and sent to the Tribal Natural Resources Project Manager, 424 Sherman Avenue, Suite 306, Coeur d'Alene, ID 83814.

75. Settling Defendant may contest payment of any Future Response Costs under Paragraph 74 if it determines that the United States, the State or the Tribe has made an accounting error or if it alleges that a cost item that is included represents costs that are inconsistent with the NCP and/or the Oversight Scope. Such objection shall be made in writing within forty-five (45) days of receipt of the bill or budget and must be sent to the United States (if the United States' accounting is being disputed), the State (if the State's accounting is being disputed), or the Tribe (if the Tribe's accounting is being disputed) pursuant to Section ~~XXVI~~ XXVII (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendant shall within the forty-five (45)-day period pay all uncontested Future Response Costs to the United States, the State or the Tribe in the manner described in Paragraph 74. Simultaneously, the Settling Defendant shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Idaho and remit to that escrow account

funds equivalent to the amount of the contested Future Response Costs. The Settling Defendant shall send to the United States, the State and the Tribe, as provided in Section ~~XXVI~~ XXVII (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Defendant shall initiate the Dispute Resolution procedures in Section ~~XIX~~ XX (Dispute Resolution). If the United States, the State or the Tribe prevails in the dispute, within five (5) days of the resolution of the dispute, the Settling Defendant shall pay the sums due (with accrued interest) to the United States, the State or the Tribe (depending on which entity's costs are disputed) in the manner described in Paragraph 74. If the Settling Defendant prevails concerning any aspect of the contested costs, the Settling Defendant shall pay that portion of the costs (plus associated accrued interest) for which it did not prevail to the United States, the State or the Tribe (depending on which entity's costs are disputed) in the manner described in Paragraph 74; Settling Defendant shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section ~~XIX~~ XX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendant's obligation to reimburse the United States, the State and the Tribe for their Future Response Costs.

76. In the event that the payments required by Paragraph 73 are not made within thirty (30) days of the effective date of this Consent Decree or the payments required by Paragraph 74 are not made within forty-five (45) days of the Settling Defendant's receipt of the bill, Settling Defendant shall pay Interest on the unpaid balance. The Interest to be paid on Past

Response Costs under this Paragraph shall begin to accrue thirty (30) days after the effective date of this Consent Decree. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of the Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendant's failure to make timely payments under this Section. The Settling Defendant shall make all payments required by this Paragraph in the manner described in Paragraph 74.

77. In accordance with the UP-Tribe Consent Decree, Settling Defendant will pay the sum of \$2,000,000 for Natural Resource Damages in the Coeur d'Alene Basin Environment into an Escrow Account within fourteen days of entry of the UP-Tribe Consent Decree. Such \$2,000,000 shall be distributed amongst the Trustees by the Escrow Agent from the Escrow Account in accordance with the instructions appended hereto as Appendix [ ].

**[NOTE- GOVTs NEED TO COME TO AGREEMENT ON DISTRIBUTION.]**

78. Within ninety (90) days after entry of this Consent Decree, Settling Defendant will pay \$2,600,000.00 into an escrow account for the benefit of the ROW Trail Owner(s). The ROW Trail Owner(s) shall use such sum and any interest or investment proceeds therefrom to perform or fund Operation and Maintenance-Trail as provided in the State/Tribe Agreement. The ROW Trail Owner(s) jointly shall provide escrow and payment instructions.

79. Within ninety (90) days after entry of this Consent Decree, Settling Defendant will pay \$30,000 into an escrow account for the benefit of the ROW Trail Owner(s), which sum and any interest or investment proceeds therefrom is to be used by the ROW Trail Owner(s) for privacy screening as the ROW Trail Owner(s) may determine. The ROW Trail Owner(s) jointly shall provide escrow and payment instructions.

80. Within ninety (90) days after entry of this Consent Decree, Settling Defendant will pay \$100,000 into an escrow account for the benefit of the ROW Trail Owner(s), which sum and any interest or investment proceeds therefrom is to be used by the ROW Trail Owner(s) for upgrade of existing community facilities that will serve as amenities for trail users or other trail uses as the ROW Trail Owner(s) may determine. The ROW Trail Owner(s) jointly shall provide escrow and payment instructions.

81. On the fifth anniversary of the entry of this Consent Decree, Union Pacific may present to the Governments a proposal under which Union Pacific would be released from all obligations to perform or fund future Maintenance and Repair in return for payment of an agreed-upon amount to the State and Tribe. If the Parties are unable to reach an agreement to release Union Pacific from all future Maintenance and Repair obligations at that time, Union Pacific may continue to make proposals for release of future Maintenance and Repair obligations every five years thereafter or as otherwise mutually agreed by the Parties, ~~and the Parties agree to negotiate in good faith any such proposals from Union Pacific.~~

82. Settling Defendant will provide for appropriate livestock fencing (typical 3-strand barbed wire) to established farmers and ranchers located adjacent to the ROW only in those locations meeting the following criteria: 1) the established use of the adjacent property is commercial livestock grazing; 2) the right of way is accessible to livestock; and 3) there are no existing barricades to livestock such as surface water, current fencing or other natural barricades.

Settling Defendant and the ROW Trail-Owners shall have no obligation to maintain such fences. Such agricultural fencing shall only be provided upon written request of a person for a location meeting the criteria of this paragraph.

## XVII. INDEMNIFICATION AND INSURANCE

83.

a. Plaintiffs do not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Settling Defendant shall indemnify, save and hold harmless Plaintiffs and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action to the extent such claims arise from, or on account of, a finding of negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Further, the Settling Defendant agrees to pay the Plaintiffs costs they incur including, but not limited to, attorneys' fees and other expenses of litigation and settlement to the extent such costs arise from, or on account, of claims made against the United States, the State or the Tribe based on negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, ~~or~~ in carrying out activities pursuant to this Consent Decree. No Party shall be held out as a party to any contract entered into by or on behalf of any other Party in carrying out activities pursuant to this Consent Decree. No Party or any of its contractors shall be considered an agent of any other Party to this Consent Decree.

b. The Plaintiffs shall give Settling Defendant notice of any claim for which the United States, the State or the Tribe plans to seek indemnification pursuant to Paragraph 83.a, and shall consult with Settling Defendant prior to settling such claim.

84. Settling Defendant waives all claims against the United States, the State and the Tribe for damages or reimbursement or for set-off of any payments made or to be made to the United States, the State or the Tribe arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Project Area, including, but not limited to, claims on account of construction delays. In addition, Settling Defendant shall indemnify and hold harmless the United States, the State and the Tribe with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Project Area, including, but not limited to, claims on account of construction delays.

85.

a. Settling Defendant agrees to indemnify, save and hold harmless the United States, the State and the Tribe for or from any and all claims or causes of actions asserting that the issuance of a Certificate of Interim Trail Use by the STB or the conversion of Settling Defendant's property to a recreational use constitutes a compensable taking of a property interest. Further, the Settling Defendant agrees to pay the United States, the State and the Tribe the costs they incur including, but not limited to, reasonable attorneys' fees and other expenses of litigation and settlement arising from, or on account of, such claims or causes of action.

b. Within fifteen (15) business days after receipt by one or more of the United States, the State or the Tribe of notice of the commencement of, or the threat of commencement of, litigation concerning any such claim or cause of action, the United States, the State or the Tribe, as appropriate, shall transmit to Settling Defendant a written description of the claim or cause of action and copies of all pleadings and other information relating to the claim or

cause of action in its possession. During the course of any such litigation, the United States, the State or the Tribe, as appropriate, shall provide Settling Defendant with copies of all documents filed with the court or served upon or by the parties to that litigation. The United States, the State or the Tribe, as appropriate, shall also support any motion to intervene filed by Settling Defendant in any such litigation. Failure to notify Settling Defendant consistent with this Paragraph 85 does not operate to negate Settling Defendant's obligations as specified in this Paragraph 85 without a showing of actual prejudice to Settling Defendant from the failure to provide such notice.

c. The United States, the State, and the Tribe shall consult with Settling Defendant in the defense of such claim or cause of action or prior to settling such claim or cause of action. Nothing in the preceding sentence shall be construed to require any Party to jeopardize any privilege claim through such consultation.

86. No later than fifteen (15) days before commencing any Work on the Project Area, Settling Defendant's contractors shall secure, and shall maintain until the first anniversary of ~~EPA's~~ Plaintiffs' Certification of Completion of the Response Action pursuant to Paragraph 69.b<sub>2</sub> of Section XIV (Certification of Completion) comprehensive general liability insurance with limits of two million dollars, combined single limit, and automobile liability insurance with limits of two million dollars, combined single limit, naming the United States, the State and the Tribe as additional insureds. In addition, for the duration of this Consent Decree, Settling Defendant shall require that its contractors or subcontractors satisfy all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing Work on behalf of Settling Defendant in furtherance of this Consent Decree. Prior to commencement of Work on the Project Area under this Consent Decree, Settling Defendant's contractors shall provide to EPA, the State and the Tribe certificates of such insurance and a

copy of each insurance policy. Prior to the issuance of the Certificate of Completion of the Response Action, Settling Defendant's contractors shall resubmit such certificates and copies of policies each year on the anniversary of the effective date of this Consent Decree. Settling Defendant is self-insured and shall continue to self-insure for at least \$10 million for general liability until issuance of the Certificate of Completion of the Response Action. Prior to the issuance of the Certificate of Completion of the Response Action, Settling Defendant will provide to EPA, the State and the Tribe appropriate documentation of its self-insured status each year on the anniversary of the effective date of this Consent Decree.

#### XVIII. FORCE MAJEURE

87. "Force Majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendant, of any entity controlled by Settling Defendant, or of Settling Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendant's best efforts to fulfill the obligation. The requirement that the Settling Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential Force Majeure event and best efforts to address the effects of any potential Force Majeure event (1) as it is occurring and (2) following the potential Force Majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

88. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a Force Majeure event, the Settling Defendant shall notify orally the Governments' Project Coordinator or, in his or her absence, the EPA Project Coordinator within forty-eight (48) hours of when Settling Defendant first knew that the event might cause a delay. Within five (5) days thereafter, Settling

Defendant shall provide in writing to EPA, the State and the Tribe an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendant's rationale for attributing such delay to a Force Majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a Force Majeure event. Failure to comply with the above requirements shall preclude Settling Defendant from asserting any claim of Force Majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure.

Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant's contractors knew or should have known.

89. If EPA, after a reasonable opportunity for review and comment by the State and the Tribe, agree that the delay or anticipated delay is attributable to a Force Majeure event, the time for performance of the obligations under this Consent Decree that are affected by the Force Majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the State and the Tribe, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the Force Majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable opportunity for review and comment by the State and the Tribe, does not agree that the delay or anticipated delay has been or will be caused by a Force Majeure event, EPA will notify the Settling Defendant in writing of its decision. If EPA, after a reasonable opportunity

for review and comment by the State and the Tribe, agrees that the delay is attributable to a Force Majeure event, EPA will notify the Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the Force Majeure event.

90. If the Settling Defendant elects to invoke the dispute resolution procedures set forth in Section ~~XIX~~ XX (Dispute Resolution), it shall do so no later than fifteen (15) days after receipt of EPA's notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a Force Majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendant complied with the requirements of Paragraphs 87 and 88, above. If Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Settling Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

## XIX. DISPUTE RESOLUTION

### 91. PLAINTIFFS' DECISION-MAKING PROCESS

91. Plaintiffs shall, whenever possible, make decisions by consensus at the project manager level.

92. Informal Dispute Resolution Between or Among Plaintiffs. In the event a consensus decision cannot be reached by the Plaintiffs' Project Managers, a meeting or telephone conference shall be scheduled and held within five (5) days among the Project Managers and their immediate supervisors involved in the dispute to reach a consensus decision. If consensus cannot be reached by the Project Managers and their immediate supervisors, the dispute shall be **immediately** elevated to the EPA Region 10 Director of the Office of Environmental Cleanup, the IDEQ Waste Program Administrator, and the Tribe Natural

Resource Director (to the extent that each Plaintiff is involved in the dispute at issue) and a meeting or telephone conference shall be scheduled and held within five (5) days among whoever of these persons have agencies involved in the dispute in an attempt to resolve the dispute through informal dispute resolution. If no consensus can be reached through such informal dispute resolution, the decision of the Plaintiffs applicable to the Settling Defendant shall be as follows:

a. The EPA Region 10 Director of the Office of Environmental Cleanup shall make the final decision where such decision concerns elements of the Response Action identified in the EE/CA, such as, for example, the “Removal, Disposal, and Protective Barriers Element of the Work” in the SOW, or the “Flood Damage Repair Element of the Work” in the SOW to the extent that the Work at issue involves repair of a protective barrier over hazardous substances or otherwise involves a response to a release or threatened release of hazardous substances. The EPA Region 10 Director of the Office of Environmental Cleanup shall also make the final decision where the Plaintiffs disagree regarding the selection of the Project Coordinator pursuant to Paragraph 62 or matters under Section XIII (Assurance of Ability to Complete Work). However, where the position of the Tribe is more protective of human health and the environment with respect to the portion of the ROW which the Tribe will own and operate, the EPA Region 10 Office of Environmental Cleanup Director’s decision shall incorporate the Tribe’s position. Where the position of the State is more protective of human health and the environment with respect to the portion of the ROW which the State will own and operate, the EPA Region 10 Office of Environmental Cleanup Director’s decision shall incorporate the State’s position.

b. The IDEQ Waste Program Administrator shall make the final decision where such decision concerns an Element of the Work within the portion of the ROW which the

State will own and operate and which does not directly concern protection of human health and the environment, such as, for example, the “Trail Element of the Work” or the “Flood Damage Repair Element of the Work” in the SOW to the extent that the Work at issue does not involve repair of a protective barrier over hazardous substances or otherwise involves a response to a release or threatened release of hazardous substances. The IDEQ Waste Program Administrator’s decision shall be subject to dispute resolution under Section XX (Dispute Resolution), Paragraph 98.

c. The Tribe Natural Resource Director shall make the final decision where such decision concerns an element of the Work within the portion of the ROW which the Tribe will own and operate and which does not directly concern protection of human health and the environment, such as, for example, the “Trail Element of the Work” or the “Flood Damage Repair Element of the Work” in the SOW to the extent that the Work at issue does not involve repair of a protective barrier over hazardous substances or otherwise involves a response to a release or threatened release of hazardous substances. The Tribe Natural Resource Director’s decision shall be subject to dispute resolution under Section XX (Dispute Resolution), Paragraph 101.

d. In the event that the Plaintiffs involved in the dispute cannot agree whether a dispute directly concerns protection of human health and the environment and the EPA Region 10 Director of the Office of Environmental Cleanup believes that the dispute does involve such a concern, the decision regarding such dispute shall be made by the EPA Region 10 Office of Environmental Cleanup Director according to Paragraph 92.a. above. The EPA Region 10 Office of Environmental Cleanup Director’s decision may be submitted to formal dispute resolution pursuant to Section XX (Dispute Resolution) of this Consent Decree.

e. After Plaintiffs have reached a decision according to the process set forth in this Section, Plaintiffs shall immediately inform Settling Defendant of the decision. Settling Defendant's right to dispute such a decision shall be governed by the provisions of Section XX (Dispute Resolution).

## XX. DISPUTE RESOLUTION

93. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the ~~United States~~ Plaintiffs to enforce obligations of the Settling Defendant that have not been disputed in accordance with this Section.

Notwithstanding the provisions of Paragraphs 95-96, disputes solely concerning the State and Tribe, including payment of Future Response Costs to the State and Tribe or disputes as to which the State or Tribe has final decision-making authority pursuant to Paragraph 92 of Section XIX (Plaintiff's Decision-Making Process), shall follow the provisions set forth in Paragraphs 98-100 (State Formal Dispute Resolution) or 101-103 (Tribe Formal Dispute Resolution) below.

94 ~~92.~~ Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute.

Disputes between or among Plaintiffs shall be the subject of informal dispute resolution pursuant to Section XIX (Plaintiffs' Decision-Making Process). The period for informal negotiations shall not exceed twenty (20) days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

~~93~~ 95. Formal Dispute Resolution.

~~[GOVTS WILL REVIEW TO DEFINE ROLES]~~

~~a.~~ a. The following procedures shall govern all disputes except those for which the State is primary decisionmaker as described in Paragraphs 98-100, or those for which the Tribe is the primary decisionmaker as described in Paragraphs 101-103. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within ten (10) days after the conclusion of the informal negotiation period, ~~Settling Defendant~~ a disputing Party invokes the formal dispute resolution procedures of this Section by serving on the United States, ~~the State and the Tribe~~ remaining Parties a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the ~~Settling Defendant~~ disputing Party. The Statement of Position shall specify the ~~Settling Defendant's~~ disputing Party's position as to whether formal dispute resolution should proceed under Paragraph ~~94~~ 96 or Paragraph ~~95~~ 97.

b. Within fourteen (14) days after receipt of ~~Settling Defendant's~~ the disputing Party's Statement of Position, EPA will serve on ~~Settling Defendant~~ the disputing Party and the remaining Parties its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph ~~94~~ 96 or ~~95~~ 97. Within fourteen (14) days after receipt of EPA's Statement of Position, ~~Settling Defendant~~ the disputing Party may submit a Supplemental Statement of Position in reply. Within fourteen (14) days of receipt of ~~Settling Defendants'~~ the disputing Party's Supplemental Statement of Position, ~~the State, Tribe~~

and EPA may submit a Supplemental Statement of Position. **Any Supplemental Statements of Position shall be served on all Parties.**

c. If there is disagreement between EPA and the ~~Settling Defendant~~ disputing Party as to whether dispute resolution should proceed under Paragraph ~~94~~ 96 or ~~95~~ 97, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the ~~Settling Defendant~~ disputing Party ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs ~~94~~ 96 and ~~95~~ 97.

~~94~~ 96. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by ~~EPA~~ Plaintiffs under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendant regarding the validity of the EE/CA's, Action Memorandum's and the SOW's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of Environmental Cleanup Office (ECL), EPA Region 10, will issue a final administrative decision resolving the dispute based on the administrative record

described in Paragraph ~~94.a~~ 96.a. This decision shall be binding upon the ~~Settling Defendant~~ disputing Party, subject only to the right to seek judicial review pursuant to Paragraph ~~94.e~~ 96.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph ~~94.b~~ 96.b, shall be reviewable by this Court, provided that a motion for judicial review from the decision is filed by the ~~Settling Defendant~~ disputing Party with the Court and served on all Parties within ten (10) days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States or any other Party may file a response to ~~Settling Defendant's~~ the disputing Party's motion.

d. In proceedings on any dispute governed by this Paragraph, ~~Settling Defendant~~ the disputing Party shall have the burden of demonstrating that the decision of the ECL Director is arbitrary and capricious or otherwise not in accordance with the law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph ~~94.a~~ 96.a.

~~95~~ 97. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of the final Supplemental Statement of Position submitted pursuant to Paragraph ~~93.b~~ 95.b., the ECL Director, EPA Region 10, will issue a final decision resolving the dispute. The ECL Director's decision shall be binding on the ~~Settling Defendant~~ disputing Party unless, within ten (10) days of receipt of the decision, the ~~Settling Defendant~~ disputing Party files with the Court and serves on all of the parties ~~Parties~~ a motion

for judicial review from the decision setting forth the matter in dispute, the efforts made ~~by the parties~~ to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States or any other Party may file a response to ~~Settling Defendant's~~ the disputing Party's motion.

b. Notwithstanding Paragraph 19 of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

96 98. State Formal Dispute Resolution.

a. The following procedures shall govern any dispute solely concerning the State and the Settling Defendant, or any dispute for which the IDEQ Waste Program Administrator shall make the final decision under Paragraph 92.b. of Section XIX (Plaintiffs' Decision-Making Process). In the event that the State and the Settling Defendant cannot resolve a dispute by informal negotiations under Paragraph 94, the position advanced by the State shall be considered binding unless, within ten (10) days after the conclusion of the informal period, the Settling Defendant invokes formal dispute resolution procedures by serving on the State, with copies to the Tribe and the United States, a written Statement of Position on the matters in dispute, including but not limited to, any factual data, analysis or opinions supporting that position and any supporting documentation relied upon by the Settling Defendant. **The Statement of Position shall specify the Settling Defendant's position as to whether formal dispute resolution should proceed under Paragraph 99 or Paragraph 100.**

b. Within fourteen (14) days after receipt of the Settling Defendant's Statement of Position, the State will serve on the Settling Defendant, **with copies to the Tribe and the United States,** its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the

State. The State's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 99 or 100. Within fourteen (14) days after receipt of the State's Statement of Position, Settling Defendant may submit a Supplemental Statement of Position in reply. Within fourteen (14) days of receipt of the Settling Defendant's Supplemental Statement of Position, the State may submit a Supplemental Statement of Position. **The United States and the Tribe may submit statements of position, with copies to the Settling Defendant, and within fourteen (14) days after receipt of any such statements the Settling Defendant and the State may submit replies.**

c. If there is disagreement between the State and the Settling Defendant as to whether dispute resolution should proceed under Paragraph 99 or 100, the parties to the dispute shall follow the procedures set forth in the paragraph determined by the State to be applicable. However, if the Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability as set forth in Paragraphs 99 and 100.

99. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by Plaintiffs under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendant regarding the validity of the EE/CA's, Action Memorandum's and the SOW's provisions.

a. An administrative record of the dispute shall be maintained by the State and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, the State may allow submission of supplemental statements of position by the parties to the dispute.

b. The IDEQ Waste Program Administrator will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 99.a. This decision shall be binding upon the Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraph 99.c. and d.

c. Any administrative decision made by the State pursuant to Paragraph 99.b. shall be reviewable by this Court, provided that a motion for judicial review from the decision is filed by the Settling Defendant with the Court and served on all Parties within ten (10) days of receipt of the State's decision. The motion shall include a description of the matter in dispute, the efforts made to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The State may file a response to Settling Defendant's motion. **The United States and the Tribe may seek to intervene.**

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the IDEQ Waste Program Administrator is arbitrary and capricious or otherwise not in accordance with the law. Judicial review of the State's decision shall be on the administrative record compiled pursuant to Paragraph 99.a.

100. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of the final Supplemental Statement of Position submitted pursuant to Paragraph 98.b., the IDEQ Waste Program Administrator will issue a final decision resolving the dispute. The IDEQ Waste Program Administrator's decision shall be binding on the Settling Defendant unless, within ten (10) days of receipt of the decision, the Settling Defendant files with the Court and serves on all Parties a motion for judicial review from the decision setting forth the matter in dispute, the efforts made to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The State may file a response to Settling Defendant's motion. **The United States and the Tribe may seek to intervene.**

b. Notwithstanding Paragraph 19 of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

101. Tribe Formal Dispute Resolution.

a. The following procedures shall govern any dispute solely concerning the Tribe and Settling Defendant, or any dispute for which the Tribe's Natural Resource Director shall make the final decision under Paragraph 92.c. of Section XIX (Plaintiffs' Decision-Making Process). In the event that the Tribe and the Settling Defendant cannot resolve a dispute by informal negotiations under Paragraph 94, the position advanced by the Tribe shall be considered binding unless, within ten (10) days after the conclusion of the informal period, the Settling Defendant invokes formal dispute resolution procedures by serving on the Tribe, with copies to the State and the United States, a written Statement of Position on the matters in dispute, including but not limited to, any factual data, analysis or opinions supporting that position and any supporting documentation relied upon by the Settling Defendant. **The Statement of**

**Position shall specify the Settling Defendant's position as to whether formal dispute resolution should proceed under Paragraph 102 or Paragraph 103.**

b. Within fourteen (14) days after receipt of the Settling Defendant's Statement of Position, the Tribe will serve on the Settling Defendant, with copies to the State and the United States, its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the Tribe. The Tribe's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 102 or 103. Within fourteen (14) days after receipt of the Tribe's Statement of Position, Settling Defendant may submit a Supplemental Statement of Position in reply. Within fourteen (14) days of receipt of the Settling Defendant's Supplemental Statement of Position, the Tribe may submit a Supplemental Statement of Position. The United States and the State may submit statements of position, with copies to the Settling Defendant, and within fourteen (14) days after receipt of any such statements the Settling Defendant and the State may submit replies.

c. If there is a disagreement between the Tribe and the Settling Defendant as to whether dispute resolution should proceed under Paragraph 102 or 103, the parties to the dispute shall follow the procedures set forth in the paragraph determined by the Tribe to be applicable. However, if the Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 102 and 103.

102. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and for all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the

procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by the Plaintiffs under this Consent Decree; and (2) the adequacy of the performance of the response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendant regarding the validity of the EE/CA's, Action Memorandum's and the SOW's provisions.

a. An administrative record of the dispute shall be maintained by the Tribe and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, the Tribe may allow submission of supplemental statements of position by the parties in the dispute.

b. The Tribe's Natural Resource Director will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 102.a. This decision shall be binding upon the Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraph 102.c. and d.

c. Any administrative decision made by Tribe pursuant to Paragraph 102.b. shall be reviewable by this Court, provided that a motion for judicial review from the decision is filed by the Settling Defendant with the Court and served on all Parties within ten (10) days of receipt of the Tribe's decision. The motion shall include a description of the matter in dispute, the efforts made to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The Tribe may file a response to Settling Defendant's motion. **The United States and the State may seek to intervene.**

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Tribe's Natural Resource Director is arbitrary and capricious or otherwise not in accordance with the law. Judicial review of the Tribe's decision shall be on the administrative record compiled pursuant to Paragraph 102.a.

103. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of the final Supplemental Statement of Position submitted pursuant to Paragraph 101.b., the Tribe's Natural Resource Director will issue a final decision resolving the dispute. The Tribe's Director's decision shall be binding on the Settling Defendant unless, within ten (10) days of receipt of the decision, the Settling Defendant files with the Court and serves on all Parties a motion for judicial review from the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The Tribe may file a response to Settling Defendant's motion. **The United States and the State may seek to intervene.**

b. Notwithstanding Paragraph 19 of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

104. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendant under this Consent Decree not directly in dispute, unless EPA, the State, or Tribe, as the case may be, or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall

continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph ~~105~~ 113. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section ~~XX~~ XXI (Stipulated Penalties).

~~XX.~~ XXI. STIPULATED PENALTIES

~~97~~ 105. Settling Defendant shall be liable for stipulated penalties to the United States, the State and the Tribe in the aggregate amounts set forth in Paragraphs ~~98.a~~ 106.a. and ~~99~~ 107 for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). In the event it is liable for a stipulated penalty, Settling Defendant will pay one-third of the aggregate amount of the stipulated penalty to each of the United States, the State and the Tribe. “Compliance” by Settling Defendant shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by ~~EPA Plaintiffs~~ pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

~~98~~ 106. a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 14th day
\$5,000	15th through 30th day
\$10,000	31st day and beyond

b. Activities/Deliverables.

Submission of deliverables in compliance with Section 4 of the SOW.

Initiation of construction activities in compliance with Section 4 the SOW.

Completion of any element of the Response Action as further described in Section 4 of the SOW.

~~99~~ 107. For all other requirements of this Consent Decree, stipulated penalties shall accrue for each violation in the following amounts:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$5,000	31st day and beyond

~~100~~ 108. In the event that ~~EPA~~ any Plaintiff assumes performance of a portion or all of the Work pursuant to Paragraph ~~115~~ 123 of Section ~~XXI~~ XXII (Covenants Not to Sue by Plaintiffs), Settling Defendant shall be liable for a stipulated penalty in the amount of three (3) times the cost incurred by ~~EPA~~ such Plaintiff to perform that portion of the Work or \$500,000, whichever is less. This penalty shall be in addition to any applicable daily penalties under Paragraphs ~~98~~ 106 and ~~99~~ 107 that accrue until the time that ~~EPA~~ such Plaintiff assumes performance of a portion or all of the Work. Such daily penalties shall not continue to accrue after ~~EPA~~ such Plaintiff assumes performance of a portion or all of the Work.

~~101~~ 109. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (~~EPA~~ Approval of Plans and Other Submissions), during the period, if any, beginning on the thirty-first (31st) day after ~~EPA's~~ Plaintiffs' receipt of such submission until the date that ~~EPA~~

~~notifies~~ Plaintiffs notify Settling Defendant of any deficiency; (2) with respect to a decision by the ~~ECL Director, EPA Region 10, under Paragraph 94.b or 95.a of Section XIX applicable~~ Plaintiff decisionmaker under Section XX (Dispute Resolution), during the period, if any, beginning on the twenty-first (21st) day after the date that the final Supplemental Statement of Position is submitted pursuant to Paragraph ~~93.b, 95.b., 98.b. or 101.b., as applicable,~~ until the date that the ~~ECL Director applicable~~ Plaintiff decisionmaker issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section ~~XIX XX~~ (Dispute Resolution), during the period, if any, beginning on the thirty-first (31st) day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

~~402. 110.~~ Following ~~EPA's~~ Plaintiffs' determination that Settling Defendant has failed to comply with a requirement of this Consent Decree, ~~EPA~~ Plaintiffs may give Settling Defendant written notification of the same and describe the noncompliance. EPA, the State and the Tribe may send the Settling Defendant a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA, the State or the Tribe has notified the Settling Defendant of a violation.

~~403 111.~~ All penalties accruing under this Section shall be due and payable to the United States, the State and the Tribe within thirty (30) days of the Settling Defendant's receipt from ~~EPA~~ Plaintiffs of a demand for payment of the penalties, unless Settling Defendant invokes the Dispute Resolution procedures under Section ~~XIX XX~~ (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to:

U.S. Environmental Protection Agency  
EPA Hazardous Substance Superfund  
P.O. Box 360903M  
Pittsburgh, Pennsylvania 15251

shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID #103D, the DOJ Case Number 90-11-3-128L, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section ~~XXVI~~ XXVII (Notices and Submissions), and to:

Regional Financial Management Officer  
U.S. EPA Region 10  
1200 Sixth Avenue  
Seattle, Washington 98101

All payments to the State under this Section shall be paid by check made payable to Idaho Division of Environmental Quality, shall be mailed to ~~[NEED INSTRUCTIONS]~~ IDEQ, Fiscal Office, 1410 N. Hilton, Coeur d'Alene, ID 83706-1253, shall indicate that the payment is for stipulated penalties and shall reference this Consent Decree. All payments to the Tribe under this section shall be paid by check made payable to the Coeur d'Alene Tribe, shall be mailed to ~~[NEED INSTRUCTIONS]~~ Coeur d'Alene Tribe Financial Manager, Tribal Headquarters, 850 A Street, P.O. Box 408, Plummer, ID 83851, shall indicate that the payment is for stipulated penalties and shall reference this Consent Decree.

~~404~~ 112. The payment of penalties shall not alter in any way Settling Defendant's obligation to complete the performance of the Work required under this Consent Decree.

~~405~~ 113. Penalties shall continue to accrue as provided in Paragraph ~~404~~ 109 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA, the State or the Tribe that is not appealed to this Court, accrued penalties determined to be owing shall be

paid to EPA, the State and the Tribe within fifteen (15) days of the agreement or the receipt of EPA's, the State's or the Tribe's decision or order;

b. If the dispute is appealed to this Court and the United States, the State or the Tribe prevails in whole or in part, Settling Defendant shall pay all accrued penalties determined by the Court to be owed to EPA, the State and the Tribe within sixty (60) days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any party, Settling Defendant shall pay all accrued penalties determined by the District Court to be owing to the United States, the State ~~or~~ and the Tribe into an interest-bearing escrow account within sixty (60) days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every sixty (60) days. Within fifteen (15) days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA, the State and the Tribe or to Settling Defendant to the extent that it prevails.

~~406~~ 114.

a. If Settling Defendant fails to pay stipulated penalties when due, the United States, the State or the Tribe may institute proceedings to collect the penalties, as well as interest.

Settling Defendant shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph ~~403~~ 111 at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

b. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States, the State or the Tribe to seek any other remedies or sanctions available by virtue of Settling Defendant's violation of this Consent Decree or of the statutes and regulations upon which it is based, including, but not limited to,

penalties pursuant to Section 122(l) of CERCLA. Provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

~~107~~ 115. Notwithstanding any other provision of this Section, the United States, the State and/or the Tribe may, in their sole, unreviewable discretion, waive any portion of the stipulated penalties owed to them that have accrued pursuant to this Consent Decree.

~~XXI~~ XXII. COVENANTS NOT TO SUE BY PLAINTIFFS

~~108~~ 116. Covenants Not to Sue for Response Actions and Costs. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs ~~110, 111~~ 118, 119 and ~~114~~ 122 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), Section 311 of the Clean Water Act, 33 U.S.C. § 1321, or Section 7003 of RCRA, 42 U.S.C. § 6973, for the recovery of response or removal costs or the performance of response or removal actions relating to the presence of or the release or threatened release of Waste Materials at, in, from, on, or under the Project Area. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs ~~110, 111~~ 118, 119 and ~~114~~ 122 of this Section, the State covenants not to sue or to take action against Settling Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), the Hazardous Waste Management Act (HWMA), Idaho Code Section 39-4401, et seq., the Environmental Protection and Health Act (EPHA), Idaho Code Section 39-101, et seq., or any other applicable statutory or common law provision to recover costs or damages or the

performance of actions relating to the presence of or the release or threatened release of Waste Materials at, in, from, on, or under the Project Area. In consideration of the actions that will be performed and the payments that will be made by Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs ~~110, 111~~ 118, 119 and ~~114~~ 122 of this Section, the Tribe covenants not to sue or take action against Settling Defendant pursuant to Sections 106 and 107 of CERCLA or any other applicable statutory, tribal law or common law provision for the recovery of costs or damages or the performance of actions relating to the presence of or the release or threatened release of Waste Materials at, in, from, on, or under the Project Area. Except with respect to future liability, these covenants not to sue shall take effect upon receipt by Plaintiffs of the payments required by Paragraph 73 of this Decree (Reimbursement of Past Response Costs). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of the Response Action ~~by EPA~~ pursuant to Paragraph 69.b<sub>2</sub> of Section XIV (Certificate of Completion). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendant, and, with respect to liability derived from Settling Defendant, to its successors and assigns, and do not extend to any other person.

~~109~~ 117.      Covenant Not to Sue for Natural Resource Damages.

a.      In consideration of the actions that will be performed and the payments that will be made by the Settling Defendant under the terms of this Consent Decree, the United States, the State and the Tribe covenant not to sue or to take administrative action against Settling Defendant, pursuant to CERCLA, the Clean Water Act, the Oil Pollution Act, the Idaho Hazardous Waste Management Act, the Idaho Environmental Protection and Health Act, or any other federal, state, Tribal, or common law, for costs or damages recoverable under CERCLA

and for injunctive relief, costs or damages recoverable under all such other state, Tribal or common law authorities or the Federal Water Pollution Control Act for injury to, destruction of or loss of Natural Resources including without limitation assessment costs and any and all damages for the restoration, replacement, or acquisition of the equivalent of injured or destroyed or lost Natural Resources and Natural Resource Damages resulting from the presence, release or threatened release of Waste Materials within, at, in, from, on, or under the Coeur d'Alene Basin Environment;

b. The covenants not to sue in Paragraph ~~109.a~~ 117.a, shall take effect upon the receipt by the Natural Resource Trustees of the payments required by Paragraphs 77 and 78 of Section XVI (Reimbursement of Response Costs and Payments in Settlement of Natural Resource Damages Claims). These covenants not to sue are conditioned upon the complete and satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendant, and, with respect to liability derived from Settling Defendant, to its successors and assigns, and do not extend to any other person.

~~110~~ 118. Plaintiffs' Pre-certification Reservation With Respect to the Covenant Not to Sue for Response Actions and Costs.

a. Notwithstanding any other provision of this Consent Decree, the United States, the State and the Tribe reserve, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant

- (1) to perform further response actions relating to the Project Area or
- (2) to reimburse Plaintiffs for additional costs of response

if, prior to Certification of Completion of the Response Action,

- (a) conditions at the Project Area, previously unknown to Plaintiffs, are discovered or,
- (b) information, previously unknown to Plaintiffs, is received, in whole, or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Response Action is not protective of human health or the environment.

b. Except as otherwise provided in Paragraph ~~110.a~~ 118.a, or elsewhere in this Consent Decree, the Settling Defendant reserves all defenses it may have with regard to any actions taken by Plaintiffs under this Paragraph.

~~111~~ 119. Plaintiffs' Post-certification Reservation With Respect to the Covenant Not to Sue for Response Actions and Costs.

a. Notwithstanding any other provision of this Consent Decree, the United States, the State and the Tribe reserve, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant

- (1) to perform further response actions relating to the Project Area or
- (2) to reimburse the Plaintiffs for additional costs of response

if, subsequent to Certification of Completion of the Response Action,

- (a) conditions at the Project Area, previously unknown to Plaintiffs, are discovered, or
- (b) information, previously unknown to Plaintiffs, is received, in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Response Action is not protective of human health or the environment.

b. Except as otherwise provided in Paragraph ~~44-a~~ 119.a. or elsewhere in this Consent Decree, the Settling Defendant reserves all defenses it may have with regard to any actions taken by Plaintiffs under this Paragraph.

~~442~~ 120.      Known Information and Conditions

a. For purposes of Paragraph ~~440~~ 118 the information and the conditions known to Plaintiffs shall include only that information and those conditions known to Plaintiffs as of the date of lodging of this Consent Decree. For purposes of Paragraph ~~440~~ 118, information and conditions known to Plaintiffs shall include information and conditions:

i) included in the EE/CA and its attachments for the Project Area, the administrative records and site files for the Project Area, the Bunker Hill Superfund Site or the Basin Wide RI/FS, and any written information submitted to and received by the Plaintiffs' Project Managers or Coordinators prior to the date of lodging of this Consent Decree; ii) included in or developed or reviewed pursuant to the natural resource damages assessment being conducted by the United States and/or the Tribe (including but not limited to preassessment screen(s), assessment plan(s), injury determination(s), injury quantification(s), restoration plans, damages analyses or determinations, or report(s) of assessment); (iii) included in expert reports or in the administrative record(s) or site file(s) for the natural resource damages assessment or the Basin-Wide RI/FS; (iv) included in the SOW or the Agreements in Principle among the Parties; (v) submitted to the STB to satisfy the environmental conditions referenced in Paragraph 13 of this Decree; ~~and~~ or (vi) obtained by Plaintiffs through depositions, written interrogatories, or requests for admission in U.S. v. ASARCO Inc., et al., (D. Idaho) Case No. CV 96-0122-N-EJL

or Coeur d'Alene Indian Tribe v. Union Pacific Railroad, et al., (D. Idaho) Case No. CV 91-0342-N-EJL.

b. For purposes of Paragraph ~~44~~ 119, the information and the conditions known to Plaintiffs shall include only that information and those conditions known to Plaintiffs as of the date of Certification of Completion of the Response Action. For purposes of Paragraph ~~44~~ 119, information and conditions known to Plaintiffs shall include information and conditions: i) included in the EE/CA and its attachments for the Project Area, the administrative record and site file(s) for the Project Area as of the date of Certification of Completion of the Response Action, the administrative ~~record~~ records and site ~~file(s)~~ files for the Bunker Hill Superfund Site or the Basin Wide RI/FS, and any written information submitted to and received by the Plaintiffs' Project Managers or Coordinators pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Response Action; ii) included in or developed or reviewed pursuant to the natural resource damages assessment being conducted by the United States and/or the Tribe as of the date of the Certificate of Completion of the Response Action (including but not limited to preassessment screen(s), assessment plan(s), injury determination(s), injury quantification(s), restoration plans, damages analyses or determinations, or report(s) of assessment); (iii) included in expert reports or in the administrative record(s) or site file(s) for the natural resource damages assessment or the Basin-Wide RI/FS; (iv) included in the SOW or the Agreements in Principle among the Parties; (v) submitted to the STB to satisfy the environmental conditions referenced in Paragraph 13 of this Decree; ~~and~~ or (vi) obtained by Plaintiffs through depositions, written interrogatories, or requests for admission in U.S. v. ASARCO Inc., et al., (D. Idaho) Case No. CV 96-0122-N-EJL or Coeur d'Alene Indian Tribe v. Union Pacific Railroad, et al., (D. Idaho) Case No. CV 91-0342-N-EJL.

~~443~~ 121. Plaintiffs' Reservation with Respect to the Covenant Not to Sue for Natural Resource Damages. Notwithstanding any other provision of this Consent Decree, the United States, the State and the Tribe reserve, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action for Natural Resource Damages or the restoration, replacement, or acquisition of the equivalent of the injured, destroyed or lost Natural Resources if, subsequent to entry of this Consent Decree:

a. conditions in the Coeur d'Alene Basin Environment, previously unknown to Plaintiffs are discovered, or

b. information, previously unknown to Plaintiffs is received, in whole or in part,

and these previously unknown conditions or information demonstrate that there is injury to, destruction of, or loss of Natural Resources in the Coeur d'Alene Basin Environment of a type unknown or of a magnitude significantly greater than was known at the time of entry of this Decree .

c. For purposes of Paragraph ~~443~~ 121, the information and the conditions (including the types and magnitude of injury, destruction of, or loss of Natural Resources) known to Plaintiffs shall include that known to Plaintiffs as of the date of lodging of this Consent Decree. For purposes of Paragraph ~~443~~ 121, the information and conditions (including the types and magnitude of injury, destruction of, or loss of Natural Resources) known to Plaintiffs shall include only that information and those conditions: i) included in the EE/CA and its attachments for the Project Area, and the administrative records and site files for the Project Area, the Bunker Hill Superfund Site or the Basin Wide RI/FS; ii) included in any written information submitted to and received by the Plaintiffs' Project Managers or Coordinators or the trustees' representatives prior to the date of lodging of this Consent Decree; iii) included in or

developed or reviewed pursuant to the natural resource damages assessment being conducted by the United States and/or the Tribe as of the date of lodging of this Consent Decree including but not limited to preassessment screen(s), assessment plan(s), injury determination(s), injury quantification(s), restoration plans, damages analyses or determinations, or report(s) of assessment; iv) included in expert reports or in the administrative record(s) or site file(s) for the natural resource damages assessment or the Basin-Wide RI/FS; (v) included in the SOW or the Agreements in Principle among the Parties; vi) submitted to the STB to satisfy the environmental conditions referenced in Paragraph 13 of this Decree; ~~and~~ or vii) obtained by Plaintiffs through depositions, written interrogatories, or requests for admission in U.S. v. ASARCO Inc., et al., (D. Idaho) Case No. CV 96-0122-N-EJL or Coeur d'Alene Indian Tribe v. Union Pacific Railroad, et al., (D. Idaho) Case No. CV 91-0342-N-EJL.

~~114~~ 122.        General Reservation of Rights. The covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraphs ~~108~~ 116 and ~~109~~ 117. The United States, the State and the Tribe reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all other matters, including but not limited to, the following:

- a.        claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;
- b.        liability for response costs or the performance of response actions arising from the past, present, or future disposal, release or threat of release of Waste Material outside of the Project Area;
- c.        liability for future disposal of Waste Material in the Project Area, other than as directed in this Consent Decree or otherwise ordered by EPA;
- d.        criminal liability; and

e. liability for violations of federal, tribal or state law which occur during or after implementation of the Response Action.

~~445~~ 123.      Work Takeover. In the event that Plaintiffs determine that Settling Defendant has ceased implementation of a portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment a Plaintiff entity, in consultation with the other Plaintiffs, may assume the performance of all or any portions of the Work as it determines necessary. Settling Defendant may invoke the procedures set forth in Section ~~XIX~~ XX (Dispute Resolution), ~~Paragraph 93~~ Paragraphs 96, 99 and 102, to dispute Plaintiffs' determination that takeover of the Work is warranted under this Paragraph. Costs incurred by any of the Plaintiffs in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendant shall pay pursuant to Section XVI (Reimbursement of Response Costs).

~~446~~ 124.      Notwithstanding any other provision of this Consent Decree, Plaintiffs retain all authority and reserve all rights to take any and all response actions authorized by law.

~~447~~ 125.      Plaintiffs agree not to assert any claim for response or removal costs, response or removal actions, or Natural Resource Damages against another Plaintiff entity if one of the Plaintiff entities ever comes to hold a property interest in the Project Area as a result of the reversion of a property interest, whether as a result of abandonment of all or any part of the Project Area by Settling Defendant, or any other legal mechanism, consistent with Sections 101(20) and 107(b) of CERCLA, 42 U.S.C. §§ 9601(20) and 9607(b), and Section 311 of the Clean Water Act, 33 U.S.C. § 1321.

~~XXII~~ XXIII.    COVENANTS BY SETTLING DEFENDANT

~~118~~ 126.        Covenant Not to Sue. Subject to the reservations in Paragraph ~~120~~ 128, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, the State, any Idaho county, city or local governmental entity, or the Tribe with respect to the Project Area for Past and Future Response Costs as defined in this Consent Decree, including, but not limited to,

a.        any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, 9613, or any other provision of law;

b.        any claims against the United States, including any department, agency or instrumentality of the United States, or against the State, any Idaho county, city or local governmental entity, or the Tribe, under CERCLA Sections 107 or 113 related to the Project Area, or

c.        any claims arising out of response activities at the Project Area, including claims based on Plaintiffs' selection of response actions, oversight of response actions or approval of plans for such actions.

~~119~~ 127.        Subject to the reservations in Paragraph ~~120~~ 128, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, the State, any Idaho county, city or local governmental entity, or the Tribe with respect to Natural Resource Damages for the Coeur d'Alene Basin Environment as defined in this Consent Decree,

~~120~~ 128.        The Settling Defendant reserves, and this Consent Decree is without prejudice to:

(i) claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions or the oversight or approval of the Settling Defendant's plans or activities except as provided by the preceding sentence. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA; and

(ii) any claims, causes of action or defenses the Settling Defendant may have against the United States, the State, any Idaho county, city or local government entity, or the Tribe in the event one or more of the Plaintiffs assert a claim against the Settling Defendant pursuant to the provisions of Paragraphs ~~440~~ 118 (pre-certification reservations) or ~~444~~ 119 (post-certification reservations), or ~~443~~ 121 (NRD reservations), within the scope of the claims so asserted by the Plaintiffs.

~~424~~ 129. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 12 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

~~XXIII~~ XXIV. EFFECT OF SETTLEMENT, CONTRIBUTION PROTECTION

~~422~~ 130. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Project Area, the Bunker Hill Superfund Site, the ROW, the Coeur d'Alene Basin Environment, the SOW and/or this Consent Decree against any person not a Party hereto.

~~423~~ 131. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendant is entitled to protection from contribution actions or claims for Matters Addressed in this Consent Decree to the full extent as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

~~424~~ 132. The Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it with regard to Matters Addressed in this Consent Decree, it will notify the Plaintiffs in writing no later than sixty (60) days prior to the initiation of such suit or claim.

~~425~~ 133. The Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for Matters Addressed in this Consent Decree, it will notify in writing the Plaintiffs within ten (10) days of service of the complaint on it. In addition, Settling Defendant shall notify the Plaintiffs within ten (10) days of service or receipt of any Motion for Summary Judgment and within ten (10) days of receipt of any order from a court setting a case for trial.

~~426~~ 134. In any subsequent administrative or judicial proceeding initiated by the United States, the State or the Tribe for injunctive relief, recovery of response costs, or other

appropriate relief relating to the Project Area, Settling Defendant shall not assert, and may not maintain any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States, the State or the Tribe in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section ~~XXI~~ XXII (Covenants Not to Sue by Plaintiffs).

#### ~~XXIV~~ XXV. ACCESS TO INFORMATION

~~127~~ 135. Settling Defendant shall provide to EPA, the State and the Tribe, upon request, copies of all non-privileged documents and information within its possession or control or that of its contractors or agents relating to activities at the Project Area, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the performance of the Work. Settling Defendant shall also make available to EPA, the State and the Tribe, for purposes of investigation, information gathering, or testimony, relating to the performance of the Work or implementation of the Consent Decree, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

~~128~~ 136.

a. Settling Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiffs under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b), or state or tribal law as applicable. Documents or information determined to be confidential by EPA will be afforded the protection specified in

40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, the State, and the Tribe, or if EPA has notified Settling Defendant that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), the public may be given access to such documents or information without further notice to Settling Defendant.

b. The Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege in lieu of providing documents, it shall provide the Plaintiffs with the following: (1) the title of the document, record or information; (2) the date of the document, record or information; (3) the name and title of the author of the document, record or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record or information; and (6) the privilege asserted by Settling Defendant. ~~[No final]~~ No final (including the most recent draft when there is no “final” version) documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

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~~429~~ 137. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions related to the performance of the Work or implementation of the Consent Decree contained in otherwise privileged documents.

#### ~~XXV~~ XXVI. RETENTION OF RECORDS

~~130~~ 138. Until five (5) years after the Settling Defendant's receipt of EPA's Plaintiffs' notification pursuant to Paragraph 70.b<sub>2</sub> of Section XIV (Certificate of Completion of the Work), Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or liability of any person for response actions conducted and to be conducted at the Project Area, regardless of any corporate retention policy to the contrary. Until five (5) years after the Settling Defendant's receipt of EPA's Plaintiffs' notification pursuant to Paragraph 70.b<sub>2</sub> of Section XIV (Certificate of Completion of the Work), Settling Defendant shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the Work.

~~131~~ 139. At the conclusion of this document retention period, Settling Defendant shall notify the United States, the State and the Tribe at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by the United States, the State or the Tribe, Settling Defendant shall deliver any such records or documents to EPA, the State or the Tribe. Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege, it shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record or information; (3) the name and title of the author of the document, record or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record or information; and (6) the privilege asserted by the Settling Defendant. {However, no final (including the most recent draft when there is no "final" version) documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

‡

~~132~~ 140. Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Project Area since notification of potential liability by the United States, the State or the Tribe or the filing of suit against it regarding the Project Area and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

~~XXVI~~ XXVII. NOTICES AND SUBMISSIONS

~~133~~. 141. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, the State, the Tribe, and the Settling Defendant, respectively.

As to the United States:

Chief Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DJ #90-11-3-128L

and

Director Environmental Cleanup Office  
United States Environmental Protection Agency  
Region 10  
1200 Sixth Avenue  
Seattle, WA 98101

As to EPA:

Earl Liverman  
EPA Project Coordinator  
United States Environmental Protection Agency  
Region 10  
Coeur d'Alene Field Office  
1910 Northwest Blvd. #208  
Coeur d'Alene, ID 83814

As to the State:

[Name]  
State Project Coordinator  
[Address]

As to the Tribe:

[Name]  
[Address]

As to the Governments' Project Coordinator:

[Name]  
[Address]

As to the Settling Defendant:

[Name]  
Settling Defendant's Project Coordinator  
[Address]

~~XXVII.~~ XXVIII. EFFECTIVE DATE

134 142. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

~~XXVIII.~~ XXIX. RETENTION OF JURISDICTION

135 143. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendant for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce

compliance with its terms, or to resolve disputes in accordance with Section ~~XX~~ XX (Dispute Resolution) hereof.

~~XXIX.~~ XXX. APPENDICES

~~136~~ 144. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the application for a CITU.

“Appendix B” is Union Pacific’s statement regarding ~~accepting~~ acceptance of a trail use condition.

“Appendix C” ~~is the map of the Coeur d’Alene Basin Environment.~~

~~“Appendix \_”~~ is the EE/CA.

“Appendix \_” is the Escrow Agreement.

“Appendix \_” is the **Oversight Scope**.

“Appendix \_” is the map showing the Slag Pile Area.

“Appendix \_” is the SOW and its attachments.

~~“Appendix \_” is the map showing the Wallace Yard.~~

~~XXX.~~ XXXI. COMMUNITY RELATIONS

~~137~~ 145. Settling Defendant shall propose to EPA, the State and the Tribe its participation in the community relations plan to be developed by Plaintiffs. Plaintiffs will determine the appropriate role for the Settling Defendant under the community relations plan. Settling Defendant shall also cooperate with Plaintiffs in providing information regarding the Work to the public. As requested by Plaintiffs, Settling Defendant shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by any of the Plaintiffs to explain activities at or relating to the Project Area.

~~XXXI.~~ XXXII. MODIFICATION

~~138~~ 146. Schedules specified in this Consent Decree and the SOW for completion of the Work may be modified by agreement of Plaintiffs and the Settling Defendant. All such modifications shall be made in writing.

~~139~~ 147. Except as provided in Paragraph 33 (Modification of the SOW or Related Work Plans), no material modifications shall be made to the SOW without written notification to and written approval of the Plaintiffs, Settling Defendant, and the Court. Non-material modifications may be made to the SOW upon agreement by the Parties without notification and approval by the Court. ~~Prior to providing its approval to any modification, the United States will provide the State and the Tribe with a reasonable opportunity to review and comment on the proposed modification.~~ Modifications to the SOW that do not materially alter that document may be made by written agreement between EPA, ~~after providing the State and the Tribe with a reasonable opportunity to review and comment on the proposed modification,~~ Plaintiffs and the Settling Defendant. No material modification shall be made to this Consent Decree without written notification to and written approval of all Parties and the Court. The notification required by the preceding sentence shall set forth the nature of and reasons for the requested modification. No oral modification of this Consent Decree shall be effective. Modifications that do not materially affect this Consent Decree may be made upon the written consent of all Parties affected by the modifications. Nothing herein shall be deemed to alter the Court's power to supervise or modify this Consent Decree.

~~140~~ 148. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

~~XXXII~~ XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

~~141~~ 149. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. Prior to entry of this Decree, the United States, the State and the Tribe reserve the right to withdraw or withhold their consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree in the form presented without further notice.

~~142~~ 150. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

~~143~~ 151. In the event the conditions specified in Paragraphs 23 and 27 above, are not satisfied, this Consent Decree shall terminate along with the rights and obligations set forth herein, and moneys Union Pacific has provided pursuant to Paragraphs 77-80 shall be returned to Union Pacific along with all interest or investment proceeds accrued thereon.

~~XXXIII.~~ XXXIV. SIGNATORIES/SERVICE

~~144~~ 152. The undersigned representative of the Settling Defendant to this Consent Decree, the undersigned representative of the State, the undersigned representative of the Tribe, and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

~~145~~ 153. Except as otherwise provided in Paragraphs 23, 27 and ~~143~~ 151 of this Consent Decree, Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

146 154. Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to any matter arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

SO ORDERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 1999.

BY THE COURT:

\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States of America and State of Idaho v. Union Pacific Railroad Company and Coeur d'Alene Indian Tribe v. Union Pacific Railroad Company.

For the United States of America

~~Date:~~ LOIS J. SCHIFFER  
~~Name:~~ Assistant Attorney General  
~~Title:~~ Environment & Natural Resources  
Division

Date: \_\_\_\_\_

THOMAS SWEGLE, Senior Lawyer  
Environmental Enforcement Section  
United States Department of Justice  
1425 New York Avenue, N.W.  
Washington, DC 20005  
(202) 514-3553

Date: \_\_\_\_\_

MARC HAWS  
Assistant U.S. Attorney  
District of Idaho  
P.O. Box 32  
Boise, ID 83707  
(208) 334-1211

For the State of Idaho

Date: \_\_\_\_\_

Name: \_\_\_\_\_  
Title: \_\_\_\_\_

For the Coeur d'Alene Tribe

Date: \_\_\_\_\_

Name: \_\_\_\_\_  
Title: \_\_\_\_\_

For Union Pacific Railroad Company

Date: \_\_\_\_\_

Name: \_\_\_\_\_  
Title: \_\_\_\_\_